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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 69

AMERICAN STEVEDORES, INC., PETITIONER,

vs.

ROSARIO PORELLO AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 25, 1946.

CERTIORARI GRANTED MAY 6, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. a]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant.

APPENDIX TO BRIEF OF RESPONDENT-APPELLANT, UNITED STATES OF AMERICA—Filed September 7, 1945

On appeal from the United States District Court for the Southern District of New York

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[fol. 1] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

STATEMENT UNDER RULE 13 (4)

This suit was commenced by the filling of a libel against United States of America on March 29, 1943. On November 22, 1943 an amended libel was filed.

The answer of Respondent, United States of America, was filed on November 26, 1943. On May 8, 1944 United States of America filed a petition under Admiralty Rule 56 impleading American Stevedores, Inc. Respondent-impleaded, American Stevedores, Inc., filed its answer to the amended libel and to the impleading petition on June 15, 1944.

There was no arrest or attachment.

[fol. 2] Trial took place on November 6, 8, 9 and 10, 1944 before Honorable Samuel Mandelbaum.

No question was referred to a commissioner, master, or referee.

A final decree for the libellant against the respondent and respondent-impleaded was entered on December 21, 1944.

Notice of appeal was served and allowance obtained on March 14, 1945.

Proctor for the libellant is Jacob Rassner, 220 Broadway, Borough of Manhattan, City of New York.

Proctor for United States of America is John F. X. McGohey, Howard F. Fanning of counsel, 45 Broadway, Borough of Manhattan, City of New York.

Proctors for American Stevedores, Inc. are Alexander & Ash, Edward Ash of counsel, 76 Beaver Street, Borough of Manhattan, City of New York.

[fol. 3] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA and WAR SHIPPING ADMINISTRATION, Respondents.

LIBEL

To the Honorable Judges of the United States District Court for the Southern District of New York.

The libel of Rosario Porello, against the United States of America and War Shipping Administration in an action under the provisions of suits in Admiralty Act of 1920, for the recovery of damages sustained.

Libel by Seamen under Special Rule for Seamen to Sue:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent, War Shipping Administration is and was a governmental agency created by law and established for the purpose, among other things, [fol. 4] of purchasing, chartering, leasing, managing and

operating vessels for and on behalf of the respondent, United States of America.

Third: That upon information and belief, that at all the times hereinafter mentioned, the respondent, United States of America, owned a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come within the jurisdiction of this Honorable Court.

Fourth: That upon information and belief, that at all the times hereinafter mentioned, the respondent, War Shipping Administration, owned a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come within the jurisdiction of this Honorable Court.

Fifth: That at all the times hereinafter mentioned, the respondent, United States of America, operated, managed and controlled a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come come within the jurisidiction of this Honorable Court.

Sixth: That at all the times hereinafter mentioned, the respondent, War Shipping Administration, operated, managed and controlled a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to become within the jurisdiction of this Honorable Court.

Seventh: That at all the times hereinafter mentioned the said S. S. "Thomas Stone", was flying the American flag [fol. 5] and was of American registry and engaged as a merchant vessel.

Eighth: That at all the times hereinafter mentioned the said S. S. "Thomas Stone", was documented and registered in the name of the United States of America and/or the War Shipping Administration and was operated for and on behalf of the United States of America.

Ninth: That at all the times hereinafter mentioned, the libelant was and still is a citizen of the United States of America and of the State of New York.

Tenth: That at all the times hereinafter mentioned, the libelant was employed as a seaman.

Eleventh: That at all the times hereinafter mentioned, the libelant was employed aboard the vessel, S. S. "Thomas Stone".

Twelfth: That at all the times hereinafter mentioned, the libelant was engaged in maritime duties.

Thirteenth: That on or about the 23rd day of September, 1942, while the libelant was carefully, properly, prudently employed aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer the injuries hereinafter more particularly described, by reason of the carelessness, recklessness and negligence of the respondents, their servants, agents and employees, in failing, neglecting and omitting to provide the libelant with a safe place wherein to work; in failing to provide him with a seaworthy vessel; and without safe, proper and adequate [fol. 6] tools, appliances and implements, including a winch and its appurtenances; and the respondents were further at fault in providing a winch and appurtenances which were in a poor, broken and dilapidated condition, out of order and repair; and in failing to take any means or precautions to remedy or rectify the said conditions, after due notice thereof; in failing to properly supervise the work in question; all of which resulted in certain cargo coming down with unusual force and violence and coming in violent contact with the person of the libelant, resulting in his suffering the injuries hereinafter more particularly described; and the respondents were otherwise careless, reckless and negligent in the premises, without any fault or contributory negligence on the part of the libelant.

Fourteenth: That by reason of the foregoing, libelant suffered injuries to his head, body and limbs and was rendered sick, sore, lame and disabled and so remains; has suffered severe shock to his entire nervous system; has been and will be prevented from working; has been and still is under hospital care and treatment; has suffered and still suffers great pain; has lost and will continue to lose large sums of money which he otherwise would have earned; has spent and upon information and belief will have to expend large sums of money for medical and surgical aid and attendance and medicines, and upon information and belief, has been permanently injured all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Fifteenth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and [fol. 7] that the respondents be compelled to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent and each of them be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the within cause of action, to wit, the sum of Fifty Thousand ($50,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

(Verified by Jacob Rassner, Attorney for Libelant, on March 26, 1943.)

[fol. 8] UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENT'S EXCEPTIONS TO LIBEL—Filed June 23, 1943

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The exceptions of the United States of America, respondent in the above-entitled cause, respectfully show:

I

It appears from the exceptive allegations hereunto attached, that the libellant has no cause of action by reason of the matters alleged in the libel, or any of them.

Wherefore, respondent prays that said libel be dismissed and that the United States of America may recover its costs and disbursements herein.

Howard F. Corcoran, Acting United States Attorney, Proctor for Respondent, United States of America, Office and P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 9] UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIVE ALLEGATIONS

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The exceptive allegations of the United States of America, respondent in the above-entitled cause, respectfully show:

I

The United States of America was and is a sovereign power.

II

At all of the times mentioned in the libel, the respondent, United States of America, was and now is the owner of a certain vessel known as the United States Navy Transport Thomas Stone (formerly President Van Buren) being [fol. 10] operated on behalf of the United States of America as represented by the United States Navy.

III

The said United States Navy Transport Thomas Stone (formerly President Van Buren) at the times mentioned in the libel was not employed as a merchant vessel but as a public vessel of the United States.

IV

The libel, which is brought by Rosario Porello to recover for personal injuries sustained on the United States Navy Transport Thomas Stone (formerly President Van Buren), cannot be maintained under the Public Vessels Act, 1925, 46 U. S. C. A., Section 781.

V

By reason of the matters hereinbefore set forth, the libellant has no cause of action for any of the matters set forth in said libel, if true or at all.

Howard F. Corcoran, Acting United States Attorney, Proctor for Respondent, United States of America, Office and P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 11] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A-127-36 OP. NO. 14,891

ROSARIO PORELLO,

Libellant.

against

UNITED STATES OF AMERICA and WAR SHIPPING ADMINISTRATION

Respondents.

APPEARANCES:

Jacob Rassner, Esq., Proctor for Libellant. James B. McNally, U. S. Attorney, for Respondent; William E. Collins, Esq., Special Assistant to the U. S. Attorney, of Counsel, Anthony Blasi, Esq., Advocate.

OPINION OF COXE, J., OVERRULING EXCEPTIONS TO LIBEL—Filed Oct. 18, 1943

COXE, D. J.:

These are exceptions filed by the United States to a libel for damages for personal injuries.

The libellant was a stevedore in the employ of an independent stevedoring company engaged in loading the S. S. *Thomas Stone*, a public vessel of the United States. He was injured on September 23d, 1942, while working on the vessel, and the libel alleges that his injuries were caused solely by the negligence of the United States.

[fol. 12] This suit is brought under the act of March 3, 1925 (43 Stat. 1112). Section 1 of this Act (46 U. S. C. A. §781) reads as follows:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, that the cause of the action arose after the 6th day of April, 1920".

The government contends that the suit is not authorized by the statute. The argument is that the words "damages

caused by a public vessel" refer to damage done physically by the vessel itself, as is the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable; the vessel has no volition of its own and can act only through employees; it causes the damage just as much in personal injury cases as in cases involving collision damage. The language of the section is clear as it stands, and I can see no reason to read into the statute qualifying words which would materially restrict its application. See *Dobson* v. *U. S.*, 27 F. 2d 807, cert. denied, 278 U. S. 653; *State of Maine* v. *U. S.* 45 F. Supp. 35.

The exceptions filed by the United States to the libel are overruled.

October 18, 1943.

Alfred E. Coxe, U. S. D. J.

[fol. 13] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF COXE, J., OVERRULING EXCEPTIONS TO LIBEL—Filed October 25, 1943

The respondent, United States of America, having filed exceptions and exceptive allegations, and the argument having duly come on to be heard before this Court on September 21, 1943, and after filing the notice of argument dated September 20, 1943, and after hearing Anthony Blasi, of counsel for the respondent, in support of the exceptions and exceptive allegations, and Jacob Rassner, proctor for libellant, in opposition, and due deliberation having been had thereon, it is

Ordered that the exceptions filed by the United States to the libel are overruled, and it is further

Ordered that the respondents' time to serve and file its answer is hereby extended to the first day of November, 1943.

Dated: New York City, October 25, 1943.

Alfred C. Coxe, U. S. D. J.

[fol. 14] UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED LIBEL

To the Honorable Judges of the United States District Court for the Southern District of New York.

The amended libel of Rosario Porello, against the United States of America under the provisions of Public Vessels Act 46, U. S. C. A. Sec. 781, the recovery of damages sustained by reason of personal injuries.

Libel By Seamen Under Special Rule For Seamen to Sue:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent, United [fol. 15] States of America, owned a certain steamship or vessel known as the U. S. S. "Thomas Stone," which was at the time of commencing suit is now in or about to come within the jurisdiction of this Honorable Court.

Third: That at all the times hereinafter mentioned, the respondent, United States of America, operated, managed and controlled a certain steamship or vessel known as the U. S. S. "Thomas Stone," which was at the time of commencing suit now is in or about to come within the jurisdiction of this Honorable Court.

Fourth: That at all the times hereinafter mentioned, the said U. S. S. "Thomas Stone," was flying the American flag as a public vessel and commissioned by the United States of America to the United States Navy to be operated by the United States Navy as a public vessel.

Fifth: That at all the times hereinafter mentioned, the said U. S. S. "Thomas Stone" was documented and registered in the name of the United States of America.

Sixth: That at all the times hereinafter mentioned, the libelant was and still is a citizen of the United States of America and of the State of New York.

Seventh: That at all the times hereinafter mentioned, the libelant was employed as a longshoreman aboard said vessel.

Eighth: That at all the times hereinafter mentioned, the libelant was employed aboard the vessel, U. S. S. "Thomas Stone."

[fol. 16] Ninth: That at all the times hereinafter mentioned, the libelant was engaged in maritime duties.

Tenth: That on or about the 23rd day of September, 1942, while the libelant was carefully, properly and prudently employed aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer the injuries hereinafter more particularly described, by reason of the carelessness, recklessness and negligence of the respondent, its servants, agents and employees, in failing, neglecting and omitting to provide the libelant with a safe place wherein to work; in failing to provide him with a seaworthy vessel; and without safe, proper and adequate tools, appliances and implements, including a winch and its appurtenances; and the respondent was further at fault in providing a winch and appurtenances which were in a poor, broken and dilapidated condition, out of order and repair; and in failing to take any means or precautions to remedy or rectify the said conditions, after due notice thereof; in failing to properly supervise the work in question; all of which resulted in certain cargo coming down with unusual force and violence and coming in violent contact with said libelant, resulting in his suffering the injuries hereinafter more particularly described; and the respondent was otherwise careless, reckless and negligent in the premises, without any fault or contributory negligence on the part of the libelant.

Eleventh: That by reason of the foregoing, libelant suffered injuries to his head, body and limbs and was rendered sick, sore, lame and disabled and so remains; has suffered severe shock to his entire nervous system; has suffered and still suffers great pain; has lost and will continue to lose sums of money which he otherwise would [fol. 17] have earned; has spent and upon information and belief will have to expend sums of money for medical and surgical aid and attendance and medicines, and upon information and belief, has been permanently injured all to

his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Twelfth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and that the respondent be compelled to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the within cause of action, to wit, the sum of Fifty Thousand ($50,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address 220 Broadway, Borough of Manhattan, City of New York.

(Verified by Jacob Rassner, Proctor for Libelant, on November 18, 1943.)

[fol. 18] UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA

The Answer of the United States of America to the amended libel herein, alleges, upon information and belief, as follows:

First: It admits that at all the times mentioned in the libel it was and still is a sovereign corporation. It denies each and every other allegation contained in Article First and asserts that it is immune from suit on account of the matters alleged in the libel.

Second: It admits the allegations contained in Article Second.

Third: It admits the allegations contained in Article Third.

Fourth: It admits the allegations contained in Article Fourth.

Fifth: It denies each and every allegation contained in Article Fifth, except it admits that U. S. S. Thomas Stone was a commissioned vessel of the U. S. Navy.

[fol. 19] Sixth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Sixth.

Seventh: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Seventh.

Eighth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Eighth.

Ninth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Ninth.

Tenth: It denies each and every allegation contained in Article Tenth.

Eleventh: It denies each and every allegation contained in Article Eleventh.

Twelfth: It denies each and every allegation contained in Article Twelfth.

Further answering the libel and as a first, separate, complete and distinct defense thereto, respondent alleges upon information and belief as follows:

Thirteenth: Any injuries alleged in the libel to have been suffered by libelant were caused in whole or in part by libelant's own or by the negligence of his co-employees or by the negligence of a person or persons for whom this respondent is not liable.

[fol. 20] Further answering the libel and as a second, separate, complete and distinct defense thereto, respondent alleges upon information and belief as follows:

Fourteenth: That the injuries to the libelant, if any, arose out of certain risks, dangers, and hazards all of which were open, obvious and well known to the libelant

at and before the said injury, and all of which had been assumed by the libelant.

Further answering the libel and as a third, separate, and distinct defense thereto, respondent alleges upon information and belief as follows:

Fifteenth: Respondent objects to the exercise by this court of jurisdiction in this action on the ground that the action has not been brought in the proper district.

Wherefore, respondent demands that the libel herein be dismissed with costs to the respondent as against the libelant and for such other, further and different relief as the justice of the cause may require.

James B. M. McNally, United States Attorney, Proctor for Respondent, United States of America: Office & P. O. Address: 45 Broadway, New York City.

(Verified by Howard F. Fanning, Special Assistant to the U. S. Attorney, on November 25, 1943.)

[fol. 21] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION UNDER 56TH RULE IN ADMIRALTY

To the District Court of the United States for the Southern District of New York:

The petition of United States of America, in the above cause, respectfully shows:

First: Your petitioner is and was at the times hereinafter mentioned a sovereign corporation and the owner of the USS Thomas Stone, a public vessel, commissioned by the United States Navy. The libelant above named has filed suit in this action to recover Fifty Thousand Dollars ($50,000.00) damages for personal injuries allegedly sustained on September 23, 1942, while employed as a longshoreman loading said vessel at Pier 11, Staten Island, New York. The libelant herein alleges that said injuries were sustained by reason of a defective winch of said vessel, [fol. 22] causing the cargo or draft to come into violent contact with the beams of the 'tween deck hatch covers,

dislodging the same, all of which came down and parts of which struck the libelant.

Second: Your petitioner further alleges on information and belief that such injuries as the libelant sustained were due solely to the negligence, if any negligence be established, of American Stevedores, Inc., the employer of the libelant and a corporation which had contracted with your petitioner to load said vessel under a written agreement dated July 12, 1942, providing in part as follows:

> "12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

Third: Your petitioner is informed and believes that American Stevedores, Inc. is a domestic corporation of the State of New York and has its principal place of business at 115 Broad Street, New York City, within this District and was in charge of the operation of said winch, and the loading of said vessel, and should be proceeded against herein and should be a party to this suit to complete the determination of the controversy.

Fourth: Your petitioner is informed and believes that all and singular the premises are true and within the [fol. 23] admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays that a citation issue in due form of law to American Stevedores, Inc., citing it to appear and answer all and singular the matters aforesaid, and that American Stevedores, Inc. be proceeded against herein as though originally made a party hereto and that if said respondent, American Stevedores, Inc., cannot be served within this District, then that its property therein be seized and attached to answer the prayer of the libelant herein and that the libel herein be dismissed as to this petitioner, and that if the Court finds the libelant entitled to recovery, then, that such recovery be had against the

American Stevedores, Inc., and that petitioner have such other and further relief as to the Court shall seem just.

James. B. M. McNally, United States Attorney,
Proctor for Respondent-Petitioner, 45 Broadway,
New York, N. Y.

(Verified by Howard F. Fanning, Special Assistant to U. S. Attorney, on May 8, 1944.)

[fol. 24] UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF AMERICAN STEVEDORES, INC. TO AMENDED LIBEL AND TO PETITION

The answer of American Stevedores, Inc., respondent-impleaded, to the amended libel and to the petition, respectfully alleges and shows upon information and belief, as follows:

Answering the Amended Libel

First: Denies any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs marked "Second," "Third," "Fourth," [fol. 25] "Fifth" and "Sixth" of the amended libel herein.

Second: Admits the allegations contained in paragraphs marked "Seventh," "Eighth" and "Ninth" of the amended libel herein.

Third: Admits that on or about the 23rd day of September, 1942, while libellant was aboard a vessel owned, operated, chartered or managed by the respondent, United States of America, he was injured, and denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraphs marked "Tenth" and "Eleventh" of the amended libel herein.

Fourth: Denies each and every allegation set forth in paragraph marked "Twelfth" of the amended libel herein.

Answering the Petition

Fifth: Admits so much of the "First" paragraph of the petition as alleges that the United States is a sovereign

corporation; that libellant above named has filed a suit in this proceeding to recover $50,000.00 for personal injuries allegedly sustained on September 23, 1942, while employed as a longshoreman loading a vessel; except as so admitted, respondent-impleaded denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraph marked "First" of the petition herein.

[fol. 26] Sixth: Admits that on or about the 17th day of July, 1942, the United States of America and this respondent-impleaded entered into a written agreement, which agreement contained the paragraph quoted in the "Second" paragraph of the petition herein; except as so admitted, this respondent-impleaded denies each and every remaining allegation set forth in paragraph marked "Second" of the petition herein.

Seventh: Admits that this respondent-impleaded is a domestic corporation of the State of New York, having an office in the Borough of Manhattan, City of New York, and within this District; that its employees were operating a winch on the vessel referred to in the petition herein which was used in connection with the loading of the said vessel; except as so admitted, respondent-impleaded denies each and every remaining allegation in paragraph marked "Third" of the petition herein.

Eighth: Denies each and every allegation set forth in paragraph marked "Fourth" of the petition herein.

Further answering the said amended libel and petition, and as a first, separate, complete and distinct defense thereto, respondent-impleaded alleges upon information and belief:

Ninth: That the libellant at all the times referred to in the amended libel was a longshoreman and was an employee of the American Stevedores, Inc., a corporation, and was engaged pursuant to such employment, in the occupation of longshoreman upon the navigable waters of the United States.

[fol. 27] Tenth: That there was in full force and effect at the time referred to in the amended libel, a statute of the United States, known as the Longshoremen's & Harbor

Workers' Compensation Act, being Chapter 509, 44 Stat. 1424, as amended.

Eleventh: That the libellant's said employer, American Stevedores, Inc., had, prior to September 23, 1942, duly and fully complied with the provisions of the said statute and secured to its employees, including the libellant herein, compensation as therein provided.

Twelfth: That pursuant to the provisions of the said statute and in accordance with the terms thereof, there was paid to the libellant by the American Stevedores, Inc., or in its behalf, by its said compensation insurance carrier, by reason of the said alleged injuries referred to in the amended libel herein, and any disability and loss of earnings resulting therefrom, compensation payments aggregating the sum of $840.00 and medical expenses amounting in the aggregate to $581.77, or a total of $1421.77.

Thirteenth: That by the acceptance and retention of the said payments, libellant has exercised his election of remedy which is exclusive under the said enactment and this Court has not jurisdiction to grant any recovery herein to the libellant.

Further Answering the Said Amended Libel and Petition, and as a Second, Separate, Complete and Distinct Defense Thereto, Respondent-Impleaded Alleges upon Information and Belief:

[fol. 28] Fourteenth: That at the time of the alleged injury, referred to in the amended libel, the libellant had all knowledge of the dangers, if any, of the employment in which he was engaged; that the alleged injury therein referred to was caused by a risk of the said occupation which libellant well knew and that libellant had assumed said risk.

Further Answering the Said Amended Libel and Petition and as a Third, Separate, Complete and Distinct Defense Thereto, Respondent-Impleaded Alleges upon Information and Belief:

Fifteenth: That if the libellant met with an accident, such as is alleged in the amended libel herein, and sustained injuries as therein set forth, said accident was caused and said injuries were sustained solely by reason of the negli-

gence of the libellant, and not by reason of any negligence on the part of this respondent-impleaded, its agents or servants.

Wherefore, respondent-impleaded prays for the entry of a decree, dismissing the amended libel and the petition herein as against it, with costs.

Alexander & Ash, Proctors for Respondent-Impleaded, American Stevedores, Inc., 76 Beaver Street, New York City.

(Verified by Gus Blair Chiarello, Vice President of American Stevedores, Inc., on June 14, 1944.)

[fol. 29] IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOUNDED BY THE RESPONDENT-IMPLEADED, AMERICAN STEVEDORES, INC., TO BE ANSWERED BY LIBELLANT, UNDER OATH

1. State whether you received, subsequent to September 23, 1942, any sums or monies from the American Stevedores, Inc., or anyone in its behalf, or for its account.

2. If your answer to the preceding interrogatory is in the affirmative, then state:

(a) The date or dates, or approximate dates, whereon such sums were received by you.

(b) The amount of such payments or sums received by you on each occasion, and the total aggregate amount.

(c) Whether such payments were for wages or services performed by you, and if so, the nature of such services performed by you subsequent to September 23, 1942, for the American Stevedors, Inc.

(d) Whether such payments were for compensation.

(e) For what reason the said sums were sent to, and received by you.

3. State whether you filed any claim for compensation with the U. S. Employees Compensation Commission, and if so, the date when the same was so filed by you.

[fol. 30] 4. State whether you at any time subsequent to September 23, 1942, attended at the office of the U. S. Employees Compensation Commission, and if so, state:

(a) The date you attended at such office.

(b) The purpose of such visit.

(c) What took place at such visit.

5. State the date when you first became advised, informed or determined to institute suit against the United States or any of its departments or bureaus, for the injuries claimed to have been sustained by you on September 23, 1942.

Alexander & Ash, Proctors for Respondent-Impleaded.

[fol. 31] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM STENOGRAPHER'S TRANSCRIPT OF MINUTES

Mr. Fanning: When this case was originally set up, your Honor, it was claimed that the accident was caused by a faulty winch. Of course, so far as the winch was concerned, this Army Officer, whom I have heard about today for the first time, would be of no moment. After the deposition of the foreman of the longshoremen had been taken—I took the depositions of two enlisted men in the United States Navy, they were electrician mates, and when I undertook to go into the condition of the winches Mr. Rassner made this statement which was put on the record: "In the interest of saving the time of the people and parties concerned, I would like to have the record show that it is my intention as proctor for the libellant to move to amend the libel at the trial of the above entitled action and predicate the cause of action primarily on the fact that a certain beam aboard the vessel was in defective condition, more particularly that one lock was broken, and that the beam and its appurtenances were not reasonably safe for the purposes intended, and it was the defective condition of the vessel in this particular which was the proximate cause of the accident, and in the interest of saving time we will rely solely upon this condition."

And I said. "And you concede that the winches at No. 1 hatch were in proper repair and working order?"

And Mr. Rassner replied, "Only for the purpose of this action, we do not have any actual position to take on that score, but to clarify the record no claim will be [fol. 32] made by this libellant in this action or any other that the proximate cause of the accident or contributing cause to the accident were the conditions of the winches."

* * * * * * * *

Mr. Fanning: Well, you are claiming, as I get your statement, that there was something wrong with the winch, and when you made this statement on the taking of these depositions you completely abandoned such a claim, as appears by the record, and I claim surprise. I don't think that I should——

Mr. Rassner: Let me answer this to eliminate any question of doubt. I will concede for the purpose of this trial that the defective condition of the winch or any condition of the winch had nothing to do with the accident.

* * * * * * * *

JAMES J. HESSION, called as a witness on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Rassner:

Q. By whom are you employed?
A. The American Stevedores, Incorporated.
Q. In what capacity?
A. Superintendent of loading and discharging of ships.
Q. How long have you been so employed?
A. For the past five years by this organization.
Q. How long have you been in the business or occupation of loading cargo—stevedoring?
A. Oh, since 1923. About 25 years.
[fol. 33] Q. You are still engaged in the same practice today?
A. Yes.
Q. Now, on the 23rd day of September 1942 were you notified of an accident on one of the vessels that was being loaded?
A. I was.

Q. Was Mr. Porella one of the men that was injured?
A. I am sure he was.

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Q. Well now, under whose orders were the hatches (page 160) opened—No. 1 hatch opened?
A. Well, we opened them up under the orders of the pier officer. We knew in advance what to put in, down in the lower hold. We stripped the hatch deck, of the pontoons, the top-sides, and we went down through the trunkway, and knowing that we only had a small amount of rations, I think they were sea rations, to put in the lower hold with the few vehicles, two or three, I am not quite sure, and knowing that we had a drift in the trunkway, to put in these packages, we didn't take out the forward beam in the last deck.

• • • • • • •

Q. Was there anything specifically said about that beam staying there or coming out?
A. No, sir.
Q. Now, no orders were given to remove that beam, is that correct?
A. No, sir.
Q. Now tell us about the manner of doing the work, particularly as to the directions and control of the work.
A. Well, the packages that were going into the lower hold were coming from the inshore side, off the dock, being [fol. 34] hoisted aboard down into the trunkway and stowed away in the lower hold.
Q. Who was in charge of that operation?
A. From a stevedore's point of view—of course we had a hatch boss in charge of the gang to give any orders to the gang that might be needed. They speak Italian. And there is a gangway man, naturally, to give signals to the winchman.

• • • • • • •

Q. Did you see the beam replaced? Did you see the men pull the beam back into place?
A. I did not, sir.
Q. You don't know how it was put back into place?
A. But I did notice that there wasn't a locking device on the beam.
Q. What do you mean by locking device?

A. It is a lug that automatically, when it is set, it becomes a preventive for the beam coming away.

Q. You say there was none there on the starboard side?

A. There was no locking device on the beam whatsoever.

Q. Could you tell whether one had been there and had been broken off or one had never been there?

A. It had never been put on that very hatch.

Q. You could see that, and from your experience you know none had ever been built on it?

A. That is right.

• • • • • • •

Cross examination.

By Mr. Fanning:

Q. Do you know that your foreman, Mr. De Mayo, knew before he undertook to load the vehicle in No. 1 lower [fol. 35] hold that there was no locking device on the starboard end of this beam?

A. I did not, sir. He didn't take it up with me.

Q. He was an experienced man, was he not?

A. Yes, sir.

Q. And if he knew that there was no locking device on the end of the beam, you would expect him to do something, wouldn't you?

A. Positively.

Q. You would expect him to take some means to see that the beam did not get unshipped or that the danger of unshipping it was absent?

A. That is right.

Q. It would have been perfectly apparent to this experienced man, knowing the device was not there, that if something struck it from the underneath side it might become dislodged?

A. That is quite right.

Q. It isn't an uncommon happening, is it, to have those things dislodged?

A. No. Ordinarily, as I stated previously, if it was on topsides, on the main deck, the locking device would have been noticed immediately.

Q. You remember Mr. De Mayo, don't you? He was hatch foreman there?

A. Oh, I don't know. I haven't seen De Mayo; if he is here I wouldn't know him and I would not be able to pick him out.

Q. He is the fellow that was in the Army. The fellow who was hatch boss and whose name I understand to be De Mayo has testified that before he loaded that vehicle he looked at the starboard end of the beam and he saw that there was no locking device there.

Mr. Rassner: I think his name is De Mare instead of De Mayo.

Q. Well, would De Mare mean anything more to you?

A. No, sir.

[fol. 36] Q. Under those circumstances should not he have taken some move to prevent the beam becoming unshipped?

A. Well, if he had noticed it, yes, he could have drawn the attention to somebody and——

Q. Well——

Mr. Rassner: Let us hear the rest of the answer.

A. In other words, if he had actually noticed it. But it was one of those things that I don't think that he could have noticed.

Q. Well, he says he did.

A. Well, if he did, he did.

Q. Then he should have done something about it, shouldn't he?

A. That is right.

Q. And it would have been a perfectly simple matter to pass a line around that beam and secure it so that it could not be unshipped, wouldn't it?

A. I am not quite so sure about that.

Q. What was to prevent him from putting a line around the beam and then lashing it?

A. Lash it to what, sir?

Q. Lashing it to any number of things that were nearby.

A. It was in the lower hold.

Q. What do you say? Wouldn't that have been a perfectly simple operation?

A. Not where that particular beam was laying at the time, that is, in the space she was in or what we were put-

ting in. We had put canned goods in the wings—parts of the hatch.

Q. This was above the place where the canned goods were put?

A. This was right on the level with the deck above, yes.

Q. And what would prevent the passing of a line around it and lashing it in place so it couldn't come out?

[fol. 37] A. There might have been possibilities but I don't think it would have been in order.

* * * * * * *

Q. Assuming that your foreman knew all about it, weren't there several things that he could have done to see that there was a degree of safety about the operation?

A. Yes, he could have.

* * * * * * *

Q. You said in your direct examination that when you were being paid on a tonnage basis you did everything possible you could to save time?

A. That is right.

Q. In other words, you were anxious to make for your employer the most money possible?

A. That is right.

Q. Being paid by the ton?

A. That is right.

Q. Now you also said, Mr. Hession, that inasmuch as you had just a small amount of canned goods and only two or three vehicles to go into No. 1 lower hold, it seemed to be a proper method of doing the work to leave that beam in there?

A. That is right.

* * * * * * *

By the Court:

Q. How many times did you see this fallen beam before the accident? How many times did you see it where it was?

A. Oh, I should say about two or three times.

Q. Two or three times. Having seen it two or three times, you knew or you had reason to know that a beam, [fol. 38] the way it was, without any locking device, could be easily dislodged?

A. Judge, I will answer you this way: I did not know that there wasn't any locking device on it.

Q. You saw it two or three times?

A. Yes, but I did not take notice of the locking device being off it. I don't think the licensed officer who was in charge of the hatch knew about it until such time as the beam came off. And we had put in there in the neighborhood of about 750 cases of rations which I would say, about 30 cases to the draft—so there was 25 drafts went down into the hold, and we operated the tonnage——

Q. By the simple device of tying the beam, tying it around with a rope, that would have answered the purpose of a locking device, would it not?

A. It would have, yes.

By Mr. Fanning:

Q. The fact that you had put in these 25, I think you said, drafts of canned goods would indicate to you, would it not, that if proper care were taken the work could be conducted with the beam in place and in safety?

A. That was the consensus of opinion of the Army and myself, yes, sir.

Q. Inasmuch as you were lowering machines into the hold, there is no chance of your applying the necessary pressure to dislodge the beam?

A. That is right.

Q. It is known that when there comes an occasion to lift something that the element of danger of unshipping the beam presents itself?

A. That is right.

Q. Did you go only into the lower hold when you went down there after having had the accident called to your [fol. 39] attention?

A. I was there before they started to load and after the accident.

Q. After the accident when you—did you go clear to the lower hold?

A. Right down.

Q. Did you notice then where the canned goods were in the hold?

A. If I remember rightly they were from skin to skin in the after part of the hold.

Q. Do you recall where they were with reference to the after coaming of No. 1?

A. To the after coaming of No. 1, just to the after coaming.

. . . . . .

Q. Did you at that time have just one type of spreader or were they constructed in various ways?

A. No. We had the one type. We had the oak wood spreader.

Q. What do you call the part of the gear that passes under the wheels of the vehicle? Is that a sling?

A. They are really part of a bridle sling.

Q. Part of a bridle sling?

A. That is right.

Q. That comes from the bottom around the end of the spreader, does it?

A. Yes.

Q. How is it made fast to the spreader itself? Does it pass through the hole or is the outer end of the spreader notched?

A. The outer end of the spreader is notched and it was held in place with a bolt, carriage bolt going through it. In other words, there is a carriage bolt goes through where the strain of the wire is to keep the spreader from splitting. It is a bolt that goes through there so that she takes the strain.

Q. How much of the outer end of the spreader would extend out beyond the wire itself?

A. Oh, a couple of inches.

. . . . . .

[fol. 40] Q. When you say that you took directions from the Army people, you don't mean, do you, that the Army officer directed the winchman, for instance, how many notches he should put on the winch to give it so much power; you don't mean any detailed direction of that sort, do you?

A. No, sir.

Q. And the Army officer does not give signals to raise and lower?

A. No, sir.

. . . . . .

Q. I am taking your observation of this particular ship because I understood you to have testified to that in your direct examination.

You mean, do you not, in substance, that the Army officer determined, for instance, which vehicle should go in the lower hold and which in the 'tween deck, with the idea of their being discharged when the vessel went into action?

A. That is right.

* * * * * * *

By Mr. Fanning:

Q. Now going back just a bit, Mr. Hession, referring again to the Army officer whose directions you said you followed: With reference to the operation of the winch, this Army officer does not have anything to do with that, does he?

A. No, sir.

Q. You employed an experienced man?

A. Experienced winchman, that is right.

Q. And he understands what levers he pushes to accomplish what he wants?

A. That is right.

Q. And your gangway man stands over the hatch and [fol. 41] by signaling to the winchman determines how the material shall be lowered or raised, whichever operation is taking place?

A. That is right. He gives the signals to the winchman.

Q. It is fair to say, isn't it, Mr. Hession, that the detail of the work such as that is within the control, or was within the control of the employees of American Stevedores?

A. That is right. I would say so, yes.

Q. You said there was very little clearance in the lower hold between the tank top cover and the underneath side of the beam?

A. There was just about head room for the average man.

Q. There has been testimony here that a half-ton truck had been lowered into that opening, athwartships, that when it reached the lower hold, about a foot from the lower hold, it was twisted by the men so that it was standing about fore and aft, that one end of the vehicle was under the forward beam in the third platform deck and that in that position the vehicle was raised and the beam unshipped. Would

you say that as a matter of good stevedoring practice your hatch foreman who was in the lower hold at the time should have first determined the relative positions of the vehicle or the spreader and the beam before he gave the order to raise it, having in mind the small clearance?

A. I am not sure whether he was there or not.

Q. Well, I am asking you to assume that he was—he has so testified and so have the other witnesses—wouldn't you expect as a matter of good stevedoring practice that he would have found out where the load was with reference to the beam before he gave an order to raise it?

. . . . . .

[fol. 42] A. Assuming that he has been in the lower hold?

Q. That is right; assume that he is in the lower hold.

A. Then I would assume that he would give an order to raise it a little just enough to take a strain on it so that he could swing it to whatever position he might want to land it.

Q. Assuming that it is already about a foot off the deck so it can be moved. Now wouldn't you say it was good stevedoring practice to look before that vehicle was moved at all, having in mind the small amount of clearance?

A. Well, if he gives a signal to the gangway man, if he is down the hold and the gangway man is up over the hatch coaming he takes the signal to come up a little bit, the gangway man gives it to the up-and-down winchman, so there is a factor there on whether the winchman puts too much juice on the fall and she comes up too quick. Now he may have had full intentions of just raising it possibly six inches, just enough to swing it, but——

Q. What was to prevent him from swinging it as it hung on the fall? It was clear of the deck, according to the evidence.

A. I wasn't there.

Q. You can't think of anything that would prevent it from swinging?

A. Not if it was clear of the deck.

Q. Having in mind that this foreman knew that there was no locking device on the end of that beam, that he could see by looking just how much clearance he had, would you not say that it was encumbent upon him to find out where the vehicle was with reference to the beam before he gave the order to raise it any amount?

. . . . . .

[fol. 43] Q. That is what a careful man should do, isn't it, Mr. Hession—look and see what the situation is?

A. Of course I am assuming everything now as to what transpired.

Q. That is all I am asking you to do.

A. All I know is that when I went down into the hold, it was after the accident happened that he discovered that the lug was—locking device was off the beam. He did not tell me that he knew about it prior to that.

Q. I am asking you to assume that, and to assume that there was a small amount of clearance, and that one end of the vehicle was under the beam, having been swung around fore and aft. Wouldn't you think that it was encumbent upon him to find out where the vehicle was with reference to the beam before he said, "Take her up"?

A. I would think he did that.

Q. You would think he would do that——

A. I think he did that.

Q. —because that would be the requirement of care that would be upon him, wouldn't it?

A. Right.

Q. Now assume that having once given the order to take her up and the vehicle not moving upward he then gave a second order to take her up, wouldn't you assume that careful practice would require him to look before he gave the second order?

A. I shall answer that this way. The average man giving a signal, whether he is a gangway man or a hatch boss or any one of the deckmen, he gives a signal in such a way that everything is clear—come ahead, the up-and-down and the Burton, or he will say, "Take a strain." Now he does not say it maybe in English to his Italian winch driver; he tells him in the Italian tongue to take a strain. Now I don't think he gave any order to take this lift right out of the hatch again.

[fol. 44] Q. Well, I am asking you to assume. You are a very experienced man and I take it from the number of years you have been along the beach you know how these operations should be conducted, don't you?

A. That is right.

Q. You are interested in safety at all times, aren't you?

A. You are right.

Q. Safety of the employees and the prevention of accidents is a thing you have drilled into you day after day.

Now I am asking you to assume that the hatch foreman knew the amount of clearance, he knew the locking device was missing from one end of the beam, he knew that one end of the vehicle was under the beam, that he gave the order to take her up and the vehicle did not move. Wouldn't you expect that that would indicate to a careful man that he was caught somewhere and there was something preventing it from moving upward?

A. Well, there's different angles to it. Maybe the signal was not relayed properly and the——

Q. If you were working there, as a careful person you would have looked and attempted to determine why it did not go up when the order was given, wouldn't you?

A. I assume I would.

Q. Of course you would, as a careful person. Is there any doubt about that?

Mr. Rassner: There is no proof that he did not. I object to this, assuming facts which are absolutely contrary to the evidence.

The Court: I will allow it.

Q. You in the position of hatch foreman would first have determined where the vehicle was with reference to the [fol. 45] beam before you gave any order to raise it, wouldn't you?

A. Positively.

Q. Certainly you would. And if an order was given and still the vehicle was not lifted, it would have occurred to you, would it not, that there was some reason why it didn't go up?

A. Well, I don't know why. I haven't the slightest idea, because I wasn't there.

Q. Well, the evidence is that immediately the second order was carried out and the vehicle raised the beam was unshipped. That indicates to you, does it not, that the spreader or something was caught on the beam when they started to raise it?

A. Something must have caught on to the beam.

* * * * * * *

Cross-examination.

By Mr. Ash:

Q. Where is the hatch boss stationed?

A. He is in complete charge of the hatch.

Q. Where is he stationed?

A. He could be on topsides, he can be on the dock. He has complete charge of the men as far as keeping them working.

Q. Does he ever get down into the hatch?

A. He goes down into the hatch, certainly.

. . . . . .

Hession—redirect:

. . . . . .

Q. Whose job was it to decide whether cargo should be lifted up again or hoisted again once it was lowered into the hold?

A. That is either the header down into the hold—There [fol. 46] is a header or hatch boss, if he was down there. If the hatch boss is there he supersedes everybody in the hatch.

Q. He would give orders?

A. He would give orders to the signalman, that is right.

Q. To the signalman. The signalman in turn would tell the winchman?

A. That is right.

Q. As to whether or not an attempt should be made to put the cargo in place or to take it up again, who would decide that question?

A. The hatch boss would decide that because he has already been informed by the pier officer or the Army officer where the package is to go.

. . . . . .

By the Court:

Q. Might there have been a locking device and in the course of the operation of the winch the locking device came loose?

A. There was never a locking device put on that beam in the shipyard.

Q. You could tell that?

A. Yes, sir. There was no marks of any lug ever being on the beam.

. . . . . .

FRANCISCO J. L'LANSO, called as a witness on behalf of respondents United States of America, et al., being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. Mr. L'lanso, you are an officer in the United States Navy or Naval Reserve?

A. Yes.

Q. In September of 1942 what rank did you hold?

A. Lieutenant.

[fol. 47] Q. What rank do you now hold?

A. Lieutenant commander.

Q. In September of 1942 to what vessel were you attached?

A. U. S. S. Thomas Stone.

Q. In what capacity?

A. First lieutenant and damage control officer.

Q. Prior to your service on the Stone had you had some other sea service?

A. I had.

Q. How long have you been going to sea altogether?

A. 14 years.

Q. Before joining the Stone what vessel were you in?

A. On the S. S. President Van Buren.

Q. And that was originally the name of the U. S. S. Thomas Stone?

A. Correct.

Q. About when was she built?

A. She was commissioned in September of 1941.

Q. Were you in her at that time?

A. I was.

Q. And remained in her how long?

A. Until July, 1943.

Q. When did you go in her in that time? I mean while she was the President Van Buren what voyage did you make in her?

A. Around-the-world voyage.

. . . . . .

Q. Were you in the vessel from the time she was put in commission as the President Van Buren until she went out of commission sometime following this accident?

A. I was.

Q. In what capacity were you in the President Van Buren?

A. Chief Officer.

Q. Mr. L'lanso, I just want to ask you a couple of questions about this plan, which I have put up on the stand here and which is marked "Hold"; do you recognize it as being [fol. 48] a plan of the hold of the Thomas Stone?

A. I do.

Q. And it is which hold?

A. No. 1.

Q. Lower hold?

A. Yes, No. 1 lower hold.

Q. In No. 1 there were how many decks?

A. There was a second deck, first platform, second platform, third platform and lower hold—four decks below the main deck.

Q. Will you indicate here what portion of the lower hold was available for cargo?

A. From Frame 45 forward to Frame 42.

Q. What is that frame 45?

A. That is the forward quarter of No. 2 lower hold.

Q. Is there some sort of a bulkhead there?

A. Yes, there is.

Q. Is it a solid affair?

A. It is a complete transverse bulkhead.

Q. At the very forward end of the hold what is there?

A. It is storage for ammunition.

Q. What is it made of?

A. Steel.

Q. The after end of the ammunition locker is where with reference to the forward coaming of the hatch?

A. Flush with it, even with it.

Q. And the ammunition locker then extends to where?

A. Up to frame 23.

Q. Is there any dividing structure in the square of the hatch under the hatch opening in the lower hold?

A. No, there is not.

Q. What is there in the after end of the hatch opening by way of partition, stanchion or other permanent structure?

A. You have a non-watertight fore and aft bulkhead of steel extending from frame 45 to the after coaming of the hatch.

[fol. 49] Q. Now, that starts at about under the after coaming of the No. 3 platform opening?

A. Yes.

Q. Is there at that point other permanent structure, stanchion or whatnot?

A. There is a pillar or stanchion at that point.

Q. Approximately what are the dimensions of that and where does it extend to? First, can you point it out to us?

A. It is T-shape and about 2 feet long by a foot and three-quarters wide.

Q. From what point to what point does it extend?

A. From the lower hold to the deckhead, that is to say, the under part or under side of the third platform deck.

Q. What activities was this vessel engaged in in the summer of 1942 prior to the happenings of this accident?

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A. She was on training operations involving amphibious landings.

Q. What did you in your capacity have to do with those operations?

A. I was responsible for the loading and discharging, the embarkation and debarkation of Army equipment and troops, and the handling of all weights on board the ship.

Q. And in that connection were any vehicles handled in or out of No. 1 hold?

A. There were.

Q. What type of vehicles were they?

• • • • • • •

A. The vehicles ranged from small trailers to, I think it was, ½ ton command cars.

Q. Was that under your observation?

A. It was.

• • • • • • •

[fol. 50] Q. How were they gotten in and out of the hold, No. 1 hold?

A. By means of the ship's cargo handling gear.

Q. During these maneuvers when they were taken out, where were they put?

A. Into boats alongside.

Q. After the maneuver of a particular practice was completed, what was done with the vehicles?

A. Reloaded into the ship.

Q. Who did that on board the ship?
A. The ship's crew.
Q. With what gear?
A. The ship's gear.
Q. How many of these practices were made during the summer of 1942?
A. Four or five.
Q. And you were on board on all of those occasions?
A. I was.

• • • • • • •

Q. You have been here since the case opened, have you not?
A. I have.
Q. And have heard all the witnesses who testified?
A. I have.
Q. Now directing your attention to the forward beam in the third platform deck about which we have had a good deal of testimony, you heard various witnesses say there was no locking device on the beam; can you tell us from your observation whether or not there was any locking device on the beam?
A. I do not remember whether or not on that particular beam there was a locking device.
Q. In your experience in the various vessels what do you say as to the presence or absence of locking devices on hatch beams such as this, how frequently do you see them?

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[fol. 51] A. I do not think I can assign a percentage of frequency of ships with locking devices on their hatch beams as compared with ships without locking devices on their hatch beams, but I have seen both arrangements in hatch beams, with and without locking devices.
Q. Assume for the purpose of this question, Mr. L'lanso, that this beam did not have a locking device; assume that the longshoremen were handling a vehicle at least 15 feet in length and that it became desirable after it had been lowered into the lower hold to raise it; in the event that such an operation might result in the unshipping of the beam, what in your opinion was the proper course to adopt with reference to the beam?

• • • • • • •

Q. Assume that some Army officer told the longshoremen to leave the beams in there and not to take them off; with those facts in mind, what in your opinion should have been done to see that the beam was secured?

A. Secure it with some means at hand.

Q. In what manner could it be secured?

The Court: For instance?

The Witness: Well, for instance, your Honor, you would have used a rope sling, putting one end through one of the lifting holes in the beam, which lifting holes have to be installed or cut into a beam so that ordinary beam slings can lift the beam in and out of the sockets—a rope sling through that lifting hole, down under the hatch coaming running outward or towards the side of the ship, and then that selfsame sling fastened onto any projection in the overhead or down on the ceiling itself, which is underfoot, [fol. 52] to whatever projection there is there.

* * * * * * *

The Court: I will allow it. You may proceed.

Q. What is there in the ceiling of the vessel on either side of the fore and aft athwartship coaming, in the ceiling of the lower hold by way of beams or other structures?

A. In the ceiling of No. 1 hold the ceiling itself had been cut away in spots, and U-bolts made of 1-inch round iron into the form of U's had been welded on the tank tops, or tank top itself, for the purpose of securing down firmly wheeled vehicles, wheeled cargo or vehicles that might be stowed in No. 1 hold.

Q. In the deck above what was there of that nature, if anything?

A. You had heavy overhead transverse beams, deck beams, supporting the third platform deck, which had lightning holes cut into them.

Q. From where to where did those beams extend?

A. From the hatch coaming to the ship's skin.

Q. Roughly how many beams of that character were there?

A. I think there were two in that hold.

Q. What was the situation in that respect on the other side, or was that the same situation on both sides?

A. It was similar.

Q. This hole that you speak of in the hatch beam, where is that with reference to the end or middle or wherever it may be?

A. It is near the end of the beam. I should judge about 6 inches towards the center from the end.

Q. How large a hole is it? Give it to us in inches.

A. About 4 inches wide and 2 inches deep.

• • • • • • •

[fol. 53] Q. Will you describe what you would consider an adequate means of securing a beam such as that without a locking device?

A. I would obtain a rope sling which is about 20 feet long, two pieces of manila line, and this line, because the ends are joined like a loop, I would put one end through the lifting hole in the end of the beam, bring the other end of the sling through that loop and tighten it down hard. Then I would take the other end of the sling, make it fast to a U-bolt on deck, or, if that was in the way for the subsequent loading of cargo, take it under the coaming of the hatch, lead it outboard, pass the end through one of the lightning holes in the overhead deck beam, pull the sling as tightly as I could manually with about two half hitches or knots on the end of it, take a piece of dunnage, or wood upon which cargo rests to keep it from chafing, and twist these two parts of the sling with the idea of tightening the sling, and then lifting one end of the piece of dunnage that was used to make this Spanish windlass and let it jam up against the overhead to keep the strain on that sling.

Q. How long would you think that operation would take?

A. Approximately five minutes.

Q. And whether or not in your opinion that would adequately prevent the beam from being unshipped?

A. I do think so.

Q. Did you observe whether or not there were any such slings about this hatch or about the ship on the day of the accident when you were there?

A. I don't remember that.

• • • • • • •

Q. Are such slings a common part of a longshoreman's gear?

A. Always.

[fol. 54] Q. How frequently are they used by longshoremen in connection with the loading and discharging of cargo?

A. Whenever the parcels of cargo are of such shape as to make them more easy of discharge with such slings.

. . . . . .

L'lanso—redirect:

. . . . . .

Q. By the way, what lead would that have, downward or upward?

A. It would have a downward lead restricted by the depth of the coaming itself. In other words, it would not lead any further down than the bottom edge of the coaming, except for the natural diameter of the rope itself.

Q. And then from the bottom of the coaming where would it lead?

A. It would lead back up again to the overhead, to this heavy deck beam which had lightning holes cut into it.

Q. Assume that that sling were made taut with this piece of wood which you described, in which direction would the pressure be exerted on that beam?

. . . . . .

JOHN S. GILLESPIE, called as a witness on behalf of respondents United States of America, et al., being duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. Mr. Gillespie, you were a member of the crew of the U. S. S. Thomas Stone in September 1942?

A. I was.

Q. You are a commissioned officer in the Naval Reserve?

A. I was.

[fol. 55] Q. You were commissioned as what?

A. Lieutenant junior grade.

Q. She was a Navy transport?

A. She was.

Q. With an entire Navy crew?

A. She was.

Q. Prior to joining her had you had some sea experience?

A. I had.

Q. What service had you been in?

A. In the Merchant Marine.

Q. For how long?

A. About nine years.

Mr. Rassner: I will concede his qualifications.

Q. You hold a master's license in the Merchant Marine?

A. I do.

Q. What was your particular job on the Stone?

A. First division officer and deck watch officer.

Q. What in general did that require you to do on board of her?

A. I took care of the operation of the forward half of the ship as far as the crew was concerned, cleanliness and training of the crew, and stood watches at sea.

Q. Were you aboard of her during these practice maneuvers in the Summer of 1942?

A. I was.

Q. And what did your position aboard have to do with the putting in and taking vehicles out of No. 1 hold?

A. I had charge of that hold, that and two others.

Q. At any time during the maneuvers did that operation come under your observation?

A. At all times.

Q. And was it done night and day?

A. Mostly at night, but we did it in the daytime too.

Q. What sort of vehicle did you put in and take out of that hold?

A. Jeeps, command cars, ambulances and weapons carriers. The jeep is a quarter-ton vehicle and the others [fol. 56] are all half-ton, what they consider half-ton vehicles.

Q. In the lower hold was there a regular schedule of what was kept in there?

A. It varied. Sometimes they would put ambulances; maybe next time they would put command cars, or maybe they would put both in. It did not always remain the same.

Q. When she was loading for her African experience what went down into the lower hold?

A. There was one command car, one weapons carrier and a trailer, a two-wheeled trailer.

Q. What is the correct name for the command car?

A. It is a half-ton personnel carrier.

Q. And the weapons carrier is described accurately how?

A. It is a half-ton truck that carries both personnel and guns—machine guns and rifles.

Q. What equipment did you have in the No. 1 lower hold in September of 1942 for the purpose of handling whatever went in there?

A. We had automobile jacks the same as are used in commercial garages for moving the vehicles around by raising one end or the other a few inches off the floor and pushing the car into place.

Q. Generally what does such a jack look like?

* * * * * * *

A. It is a hydraulic affair.

Q. About how long is it?

A. The body of the jack is approximately 3½ feet long with four wheels, hydraulically operated. It has a handle 4 or 5 feet long.

Q. What other equipment did you have down there in connection with the cargo that was carried?

A. They had—for moving the cargo?

Q. No, I mean for handling it or securing it or any-

[fol. 57] thing connected——

A. Of course we had ringbolts welded to the tank tops with holes cut in the ceiling so you could get at them to secure the cargo, and we had ringbolts or C-clamps on the arms on the skin of the ship and on all bulkheads so that the vehicles could be secured to them, so that they would not move around when the ship was under way.

Q. What did that gear look like, was it rope or wire?

A. The clamps were of ⅞-inch still rings bolted on the frames of the ship any place you want them. They are movable. You just take a wrench and move them from one frame to another if necessary.

Q. Is there some wire attached?

A. We had ¾-inch and ½-inch wire down there to secure the bumpers of the trucks to the bulkheads, to these pad-eyes or C-clamps.

Q. You have been here ever since the case opened?

A. Yes.

Q. And you heard the testimony of all of those who have testified?

A. I have.

Q. This after bulkhead of the ammunition locker extends from where to where?

A. It extends almost to the skin of the ship on each from the tank tops up through the third side, although there was about a 2½-foot space on each side.

Q. Where with reference to the third platform deck?

A. It extends from the tank tops up through the third platform deck. There was one above. The third platform deck was welded to it.

Q. What use was made of the deck on the level above the lower hold?

A. Stowing vehicles and cargo.

Q. Were there any troop accommodations in there?

A. Not on the third platform.

Q. Where were the troop accommodations going from [fol. 58] the bottom up?

A. On the second platform. That would be the one above.

Q. The next above, the third?

A. Yes.

Q. Are you familiar with the beams, hatch covers and other gear that was used in the third platform deck?

A. Yes.

Q. Assuming, Mr. Gillespie, that a half-ton weapons carrier or command car was in the course of stowage in the lower hold, that the forward beam was in place, that the longshoremen had been told by an Army officer not to remove it, that the beam did not have any locking device, that it was contemplated that the vehicle would be raised after it had been dropped into the lower hold; what in your opinion was the reasonable and proper precaution to take in connection with the beam which had been left in place?

A. They could have secured the beam in place if they were afraid they would dislodge it.

Q. In what manner could it have been secured?

A. I would take a wire through the lifting hole in the beam, lead it through one of the lightning holes in the overhead beams in the ceiling of No. 3 platform deck, put two wire clamps on it, and make it just as taut, just as secure as there would be any possible way of securing it.

Q. The lifting hole is where with reference to the end of the beam?

A. 18 inches in from the end of the beam.

Q. When you attached your wire there where would you lead it?

A. I would lead it down underneath the hatch coaming, underside of the hatch coaming.

Q. Then in which direction?

A. Back up to the ceiling beams.

Q. After you had put a strain on that wire, in which direction would the pressure be on the beam?

A. Down.

[fol. 59] Q. Assuming that there was a similar device on the other side of the beam, what in your opinion would be the possibility of dislodging the beam when handling the vehicle I have described?

Mr. Ash: Objected to.

Q. Assume, Mr. Gillespie, that the beam was raised one foot from its position so that the spreader would engage in some part of the beam, what then?

A. Before the wire that is holding the beam would break I think the spreader would break on the car.

* * * * * * *

Direct examination continued by Mr. Fanning:

Q. Mr. Gillespie, what was the dimension of the coaming from the level of the third platform deck to the lower end of the coaming on the—I am referring to the athwartship coaming?

A. The coaming was the same depth all the way around, 30 inches.

Q. This gear which you described yesterday as being available and fit for lashing the beam, how many such wires and clamps did you have in No. 1 lower hold?

A. I do not recall the exact number, but there were 15 or 20 in the holds.

Q. Where were they kept?

A. They may have been left secured to the frames or may have been laying in a corner as they were used to secure the vehicles. They may have been all piled up on the third platform.

Q. Are you able to tell me how far below the top of the beam this lifting hole was? You said yesterday it was 18 inches in from the end of the beam; can you tell me how far from the top of the beam?

[fol. 60] A. The bottom of the hole would be roughly 6 inches from the top of the beam.

Q. And I ask you roughly the dimensions of the hole.

A. As I recall the hole was roughly 4 inches in length and 3 inches high.

Q. Assume, Mr. Gillespie, that this athwartship beam, forward athwartship beam at the third platform deck, had been left in place at the direction of some Army officer, that it did not have any locking device on the starboard side, that the longshoremen were attempting to stow a command car or weapons carrier; whether or not in your opinion that operation could be conducted with reasonably safe possibilities with the conditions such as they were?

. . . . . .

Q. Mr. Gillespie, you have been here all during the testimony of the various witnesses and you have heard them describe the manner in which they conducted themselves, what they did and what happened?

A. Yes.

Q. With a knowledge of what has gone before, your knowledge of the physical facts there and your assumption of the facts which I stated a few moments ago, whether or not in your opinion the operation of the stowing of that vehicle could have been conducted with reasonable safety?

A. It could, and did in several instances that I was present at, although I was not present at this particular one.

Q. You say it could have been conducted with reasonable safety; what in your opinion should have been done to bring about that result?

A. If the man in charge had made sure that the vehicle [fol. 61] and the spreaders were clear in all respects before he ordered it lifted, it would not have caught on anything.

Q. Was there any other precaution which in your opinion should have been taken?

A. As a general rule when we were handling the trucks we put two steadying lines, one forward and one aft, on it and had one or two men on each steadying line, and they were able to handle the truck, swing it from a distance away from the truck so that they did not have to be

right up against it, so that if there was an accident they would not be under it. They were able to stand 10 feet away and swing the truck as it rose or as it was lowered.

. . . . . .

Q. Do you recall when the work of discharging was completed?

A. Loading?

Q. I am sorry, the work of loading.

A. All the cargo was on board at 2 or 3 o'clock in the afternoon, as I recall it, and the stevedores stood by for another four or five hours to assist the troops on board and to bring their B bags on board, and they helped with some of the officers' luggage.

Q. When did you sail?

A. We sailed at 6 in the morning of the 26th.

Q. Of September, 1942?

A. Yes.

Q. Has the U. S. S. Thomas Stone been in the United States since that date?

A. No.

Q. Will it ever be?

A. No.

Q. Can you help us any on this lieutenant who was spoken of? Was there some lieutenant who you understood came from Washington who had something to do with the stowing of the cargo and the order in which it went in, and so forth?

A. There was an Army officer assigned to the ship. [fol. 62] I do not know where he came from, but he was assigned to the ship as a troop transport quartermaster.

Q. Do you know his name?

A. No, I do not recall his name.

Q. Whether or not he sailed with the vessel?

A. He did sail with the vessel.

Q. Where was he when you last saw him?

Mr. Rassner. I object to that. It does not make any difference. He has been assigned to the ship. He becomes part of the personnel.

Mr. Fanning: Are you going to comment on my failure to produce him?

Mr. Rassner: No, it does not make any difference. He became part of the personnel once he was assigned.

Q. I forgot this. This accident was called to your attion on the day it happened?

A. No, the following morning. I was not aboard at the time of the accident.

Q. Had you been down in No. 1 hold at any time before the accident while you were connected with the vessel?

A. Frequently.

Q. Can you tell us whether or not there were any locking devices? Was this forward beam on the third platform deck equipped with a locking device?

A. It was not.

Q. How about the other beams in the same hatch?

A. They were not either.

Cross-examination.

By Mr. Rassner:

Q. You say the Army officer was assigned to the ves-[fol. 63] sel and became part of the personnel of the vessel and went with it?

A. He was transported along with the rest of the troops. He was laison officer between the Navy and the Army in respect to the stowage of the cargo. He gave us the priorities on the cargo in respect to the time they were to come out of the ship.

* * * * * * *

Q. The duties of this lieutenant were to take charge of the vessel insofar as the loading operation was concerned, isn't that so?

A. I can explain that.

Q. I wish you would explain it in your own way. What was the setup?

A. We did not have stevedores loading the ship. In other words, when the ship's crew handled the cargo, which was 90 per cent of the time, the troop transport quartermaster's job was to tell us which vehicle was to go in and come out first. In other words, if there were 10 vehicles to be put in a hold he told us which vehicle to go down first and be put in a corner as that would be the last one out. The same thing if he wanted another vehicle out the first when we discharged he would tell us that that was to be the last one in so that it could be left in the square of the hatch. As to how

the cargo was handled that was none of his affair. It was only how it came out and went in.

Q. He was assigned to the ship, is that correct?

A. Yes.

Q. You have information upon which you base that statement; haven't you?

A. Yes.

Q. You did not just guess about it?

A. No.

Q. What is that you base your statement on that this Army officer was assigned to the ship?

A. In all our operations where we did not have stevedores, [fol. 64] and I think the ones including the stevedores, he worked out with Mr. L'lanso, or it was worked out beforehand and handed to Mr. L'lanso the priority of the vehicles and the cargo, how it was to be stowed.

Q. Do I understand correctly that it was Mr. L'lanso who gave directions to the Army officer?

A. No, the Army officer told Mr. L'lanso the priority of the vehicles and the cargo.

Q. What was the reason for taking it up with Mr. L'lanso?

A. He was in charge of all cargo handled on the ship.

Q. Mr. L'lanso?

A. Yes.

Q. And so anything that the lieutenant wanted done would have to be done with the consent and permission of Mr. L'lanso, isn't that right?

A. That is right.

Q. And Mr. L'lanso was his superior?

A. Well, he was superior in rank, but Mr. L'lanso had to abide by whatever the Army wanted.

Q. Those were suggestions by the Army which were taken up with the man in charge of the vessel?

A. The only time that Mr. L'lanso had any right to contradict the way that the cargo would be coming into the ship would be if it endangered the stability of the ship.

Q. The Army officer could do nothing without the consent of Mr. L'lanso, isn't that right?

A. I am talking about the time——

Q. No, take it this way, the way I have given it to you, and answer me: Isn't it so that the Army officer when assigned to the ship is assigned because of his special knowledge or training for that purpose, and he suggests to Mr. L'lanso

what is to be done and Mr. L'lanso has to give him permission to do it before he can do it, isn't that so, isn't that the setup?

[fol. 65] A. No, he is assigned to the ship to make sure that the Army gets their cargo in in the right order to get it out of the ship in the right order.

Q. In order to carry out those thoughts he has to take it up with Mr. L'lanso?

A. That is right.

Q. And he has to get the approval of Mr. L'lanso?

A. That is right, as far as the stability of the ship is concerned.

Q. That all has to be done with Mr. L'lanso's consent and under his general supervision, isn't that so?

A. That is right.

Q. So that the Army officer's superior on that particular ship, the man that he has to get his orders from, is, or in than instance was, Mr. L'lanso, isn't that so?

A. He is superior in that particular job of priorities.

Q. Of Mr. L'lanso, isn't that right?

A. Yes.

* * * * * * *

Q. You knew that the locking device was absent?

A. There was never one on the beam.

Q. That none had ever been put on the beam?

A. It was never intended to put one on.

Q. What the intentions are you would not know, would you? You cannot read the mind of the builder?

A. Well, I was in the shipyard when they converted the ship.

Q. Isn't it a fact that there was no locking device on that beam at any time, including the time of the accident, isn't that true?

A. There was no locking device.

Cross examination

By Mr. Ash:

Q. You said that it was never intended that there was to [fol. 66] be a locking device on this beam?

A. There was no hole in the beam for it.

Q. I understood you to say that it was never intended that there be a locking device on this beam.

Mr. Fanning: Intended by whom?

The Witness: There was not any on the plans.

Q. Are you sure?

A. I looked at the plans of that particular hold, of that particular platform deck.

* * * * * * *

Mr. Fanning: I read the deposition of Santo DiMare, taken at Wilmington, North Carolina, June 6, 1944, at which the libellant, respondent and respondent impleaded were present. It was taken at the instance of the United States. The appearances were as follows: On behalf of the United States, Mr. Thomas H. Walker; on behalf of the libellant, Mr. Ernest Rassner, and on behalf of the American Stevedores, Inc., Mr. George Rountree.

(The following excerpts of the deposition were thereupon read to the Court):

"Q. Mr. DiMare, you are stationed at Kure Beach, North Carolina, in the Coast Artillery, aren't you?

"A. Yes, sir.

"Q. Up to December 1942 how many years had you worked as a longshoreman?

"A. Twelve years.

"Q. And of that twelve years had you worked any as a hatch boss?

"A. Yes, I worked between three and four years as a hatch boss.

[fol. 67] "Q. That was the last three or four years that you worked as a hatch boss?

"A. I mean I worked along there twelve years—I worked nine years; two years—about twelve years all together.

"Q. Out of the twelve years you worked three or four years as hatch boss?

"A. Yes, sir.

"Q. During September 1942 by whom were you employed?

"A. American Stevedores.

"Q. What was your job?

"A. Loading transport ship, with American Stevedores.

"Q. That is American Stevedores, Inc. (Incorporated) —you worked for them as hatch boss?

"A. Yes, sir.

"Q. During the latter part of September 1942 did the American Stevedores, Inc., have the job of loading Navy transport at Pier No. 11, Staten Island?

"A. Yes, sir.

"Q. When you went aboard the Navy transport at Pier No. 11, Staten Island, what were you going to do? What hatch were you going to load?

"A. No. 1 hatch.

"Q. What was your job?

"A. Hatch boss at No. 1.

"Q. When you came aboard and went to No. 1 hatch, where were the hatch covers and the strongbacks?

"A. They were in place.

"Q. What did you proceed to do?

"A. Took the hatch off.

"Q. Whose job is it to decide how many hatch covers to take off?

"A. Up to me.

"Q. How many strongbacks did you take out?

"A. I took out two.

"Q. You mean two strongbacks out of each deck?

"A. Out of each deck.

"Q. Which two strongbacks did you take out?

"A. I took out the two strongbacks on the after end.

"Q. Which way did the strongbacks run in the hatch—[fol. 68] fore and aft, or athwartship?

"A. Ran from one side of the ship to the other.

"Q. Then I take it that you took out the two beams nearest the stern of the ship—you removed the two beams nearest the stern of the ship?

"A. I removed the two after strongbacks, together with the hatch covers, and placed them on top of the forward strongback and hatch covers, which were left in place.

"Q. Did you inspect the strongbacks which were left in place?

"A. Yes, sir.

"Then did you proceed to load, or what did you proceed to do?

"A. We first removed the two after strongbacks in each deck and placed them on the strongback which was left in place in each deck.

"Q. You then started to load the ship?

"A. Yes, sir.

"Q. What were you loading?
"A. Canned goods.
"Q. What time did you start to work?
"A. Seven o'clock at night.
"Q. How long did you continue to load?
"A. Until twelve, midnight.
"Q. Did you have any trouble in loading that night?
"A. No, sir.
"Q. Winches working all right?
"A. Yes, sir.
"Q. When did you start loading again?
"A. Eight o'clock the next morning.
"Q. Did you continue to load right through that day?
"A. Sure, we worked all day, beside we stopped for lunch.
"Q. What were you loading that morning?
"A. We were loading canned goods.
"Q. Later in the morning, did you load something else, some time about eleven o'clock?
"A. I don't know if it was eleven o'clock, we started loading some trucks.
"Q. You started loading one truck?
"A. Yes, sir; one truck we got in the hold.
[fol. 69] "Q. Where did you put that truck?
"A. On the left side; on the side of the dock.
"Q. Then you put it in the left wing?
"A. In the left wing.
"Q. Did you load that without any difficulty?
"A. Yes, sir, without any difficulty.
"Q. What did you do after that?
"A. We started to load the other truck.
"Q. Another truck?
"A. Another truck.
"Q. Did you lower it to the hold all right?
"A. Which one? The other side?
"Q. Did you lower it to the hold?
"A. Yes, sir. We just put it down to the square of the hatch.
"Q. Where were you going to put that truck?
"A. On the right side; in the right or starboard.
"Q. In what part of the wing?
"A. In the after part of the starboard wing.
"Q. I believe you said you lowered it down to the square of the hatch, or the middle of the hatch, and let it rest on the bottom of the hold—then what did you do?

"A. The truck was standing right in the square of the hatch. I told them to tell the winchman to pick it up a little bit because we were going to put it in the after starboard wing.

"Q. Did they tell him to pick it up?

"A. Yes, one of the men.

"Q. What did he say?

"A. 'Pick it up a little bit.'

"Q. Did the winchman pick it up a little bit?

"A. Not the first time.

"Q. Who was the up-and-down winchman?

"A. An Italian whom we called 'Patsy'.

"Q. Who had the Burton Winch?

"A. A man by the name of Dominick.

[fol. 70] "Q. When the winchman did not pick the truck up the first time, what did you do?

"A. I repeated the command to the man to tell the winchman to pick up the truck.

"Q. What did the man tell the winchman?

"A. He told him to pick up the truck.

"Q. What did he say?

"A. 'Pick it up a little bit'.

"Q. Did the winchman pick up the truck?

"A. He picked it up, not so fast, the minute the gangwayman told him to pick it up; all at once; I don't know how they did it. All at once I saw the hatch beam and covers all down in the hold.

"Q. Just before they picked up the truck where were you standing?

"A. I was standing on the after side of the hatch, with my hands on the fender of the truck.

"Q. Which fender was it; the right or left fender?

"A. On the left front fender.

"Q. How far back from the after side of the hatch were the canned goods stored?

A. "About three feet.

"Q. How far from the canned goods which were stowed underneath the platform deck on the after side was the forward end of the truck?

"A. The truck was right up against the canned goods which were stowed on the after side, about three feet back from the edge of the hatch.

"Q. Which way was the truck standing?

"A. The truck was standing fore and aft, with the motor part of the truck pointing toward the back of the ship and the back end of the truck pointing to the forward part of the ship.

"Q. Before they raised the truck where were your men standing?

"A. They were standing on each side; four men on each side of the truck.

"Q. Four men were on the righthand side and four men on the left side?

A. "Yes, sir.

[fol. 71] "Q. Did I understand you to say that when the winchman started to raise the truck the hatch beams and hatch covers all fell down into the hold?

"A. Yes, sir.

"Q. Where was Rosario Porello standing just before the strongbacks and hatch covers fell into the hold?

"A. He was standing on the righthand side of the ship which would be the lefthand side of the truck.

"Q. After the hatch beams and hatch covers fell into the hold, where did you find Porello?

"A. I found him underneath one of the strongbacks.

"Q. Was this strongback lying completely on the deck?

"A. No, sir. One end of the strongback was resting on the deck of the lower hold and the other end of the strongback was still resting on the side of No. 3 platform deck.

"Q. How was Porello lying or resting under the beam?

"A. He was underneath.

"Q. How was he underneath?

"A. He was on his hands and knees underneath the beam with the beam resting on his shoulder. (Witness illustrated by getting on all-fours.)

"Q. Did you say that you removed Porello out of the hatch?

"A. I put Porello on platform and had him hoisted and placed on the dock.

"Q. Was anybody else hurt?

"A. There were three guys; two besides Porello.

"Q. Up to the time the hatch covers fell in had you had any trouble loading?

"A. No, sir.

"Q. Had you had any trouble with the winches?

"A. I don't think so.

"Q. Had anybody complained?

"A. I don't remember it if anybody came up and told me. I don't remember.

"Q. Did you complain to anybody about the winches?

"A. No sir.

[fol. 72] "Q. After you put Porello ashore, what did you do with the strongbacks and the hatch covers which fell into the hold?

"A. We put them in place again.

"Q. Same place and same position as they were before they fell?

"A. Yes, sir.

"Q. You put the strongbacks and hatch boards back in the same place where they were before, is that right?

"A. Yes, sir.

"Q. Then what did you do?

"A. We started to load again.

"Q. For how many days did you load after that?

"A. About two days I think.

"Q. Did you have any more trouble loading after that?

"A. No, sir.

"Q. Did you load some trucks after that?

"A. We loaded several trucks and canned goods again.

"Q. Same cargo—more trucks and more canned goods?

"A. Yes, sir.

"Q. You loaded them without any difficulty?

"A. Yes, sir.

"Q. Did you have any trouble with the winches during that time?

"A. No, sir.

"Q. You didn't complain to anybody about the winches at any time, did you?

"A. No, sir.

"Q. How are those strongbacks fastened on the square of the hatch? How are they secured? Are they put on tight, or loosely?

"A. In place.

"Q. Are they fastened?

"A. Yes, sir.

"Q. What are they fastened with?

"A. On the side of the hatch is a lock and it goes right inside.

"Q. When you take hatch cover off you have to take that hatch lock off before you take it up, is that right?

"A. Yes, sir.

"Q. Are they pulled in place?

"A. One was broken.

[fol. 73] "Q. Which one was broken?

"A. The one on the right side.

"Q. Is that the one that fell down?

"A. Yes, sir.

"Q. Was the beam not loose? Was it knocked off? Did you see the bridle?

"A. I didn't see the bridle.

"Q. When you ordered the truck to be lifted up the second time, was the truck lifted up slowly or fast?

"A. Not slow, and not fast; just jumped up a little.

"Q. How high did it jump up?

"A. About one foot from the bottom of the lower hold.

"Q. Do you know what caused the beam to fall, if you know?

"A. Yes. The lock was not in place. The beam has two locks; one lock was broken, if this corner had a lock.

"Q. Was this one of the beams that you removed that fell?

"A. No; that one was in place.

"Q. Did you remove that beam?

"A. No, sir.

"Q. Is that the one that struck Porello?

"A. Yes, sir.

"Q. Did the hatch boards fall with the beam?

"A. Yes, sir.

"Q. How many?

"A. There were a lot of hatch boards down there.

"Q. Four men were on one side of the truck and four on the other, and he was in the front of the truck?

"A. Yes, sir.

"Q. What were they doing at the time?

"A. What were they?

"Q. Just before the beam fell.

"A. They were standing around doing nothing, holding truck; they were waiting for my orders.

"Q. Can the winchman see down in the hold?

"A. Yes, sir.

[fol. 74] "Q. The winchman can look down in the hold?

"A. Yes, sir.

"Q. Who gives the orders? The man in the hold or the gangwayman on top deck?

"A. The orders are given the man down in the hold. He is supposed to give it to the gangwayman, because the winchman can see down in the hold."

"Q. And I believe you said that at the time you took the two hatch beams out of each deck you inspected the remaining hatch beam or hatch beams in each deck.

"A. Yes, sir.

"Q. And at the time you took the hatch beams out of the lower platform or the deck immediately above the lower hold you examined the remaining hatch beam or hatch beams in that deck?

"A. Yes, sir.

"Q. And you saw that this lock device was bursted?

"A. It was missing.

"Q. Was missing at that time?

"A. Yes, sir.

"Q. And that was before you started to load any cargo?

"A. Yes, sir.

"Q. Did you call their attention to the fact that the locking device was missing?

A. No, sir. I did not call their attention."

GEORGE T. BREW, called as a witness on behalf of respondents United States of America, et al., being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. What is your business?

A. A supervising stevedore.

[fol. 75] Q. By whom are you employed?

A. The United Fruit Company.

Q. How long have you been connected with the loading and discharging of vessels?

A. Since 1916.

Q. In what capacities have you been so connected?

A. I worked in the hatch as a member of the gang during 1916.

Mr. Rassner: I will concede Mr. Brew's qualifications.

Mr. Fanning: I have particular reason for wishing some of them.

Mr. Rassner: I happen to know Mr. Brew and I will concede he knows his business.

Q. Go ahead, Mr. Brew.

A. In 1919 after leaving the Army I went working as a longshoreman again. Later on in the year 1919 I became a hatch boss. In 1920 I was promoted to stevedore in charge of a ship, in which capacity I have been ever since; and I have been contracting stevedore for the Atlantic Coast Shipping Company from 1919 to 1927, and from 1927 as supervising stevedore for the United Fruit Company.

Q. Have you recently been in the Army?

A. Yes.

Q. In what capacity?

A. As a major in the Transportation Corps.

Q. And in connection with your duties in the Army did you have anything to do with loading or discharging motor vehicles from ships?

A. I did, yes.

Q. Will you describe just what you had to do in that connection?

Mr. Rassner: I object to that. I have conceded his qualifications. We are going off on a tangent as to what he did on other ships.

[fol. 76] The Court: He wants to show the type of his qualifications, I can see that, but I think you have gone far enough.

Q. You have heard the testimony of Lieutenant Commander L'lanso and Mr. Gillespie, and you just heard the deposition of one, Mr. De Mare, read. You have been in court all during that time?

A. Yes.

Q. How much experience have you had on the general work of loading and discharging motor vehicles in and out of ships?

A. I have handled many thousands of them.

Q. When did you get out of the Army?

A. On the 24th of October I was placed on inactive status.

Q. I want you to assume these facts which I will repeat as being the facts upon which I shall ask you to base an opinion: Assume that the No. 1 hatch of the U. S. S. Thomas Stone has four decks, the lowest one being called

the third platform deck; that it was approximately 43 feet from the main deck to the lower hold; that the after hatch beam and covers were removed at each deck and the forward beams and covers left in place at the direction of an Army officer; that at the third platform deck the after hatch covers and beam were placed on top of the forward covers; that the forward beam at the third platform deck was 19 feet 11½ inches long, about 21 inches deep, weighed about a ton and was set in the slots in the coaming about 10 inches to a foot deep; that the beam did not have a locking device on the starboard end and was not lashed in place; that the opening at the third platform deck was about 10 feet 5 inches fore and aft and about 20 feet wide; that the longshoremen were engaged in loading a vehicle about 15 feet 9 inches long, 6 feet 3 inches wide and about [fol. 77] 5 feet 3 inches high by means of a sling which passed under the front wheels and one which passed under the rear wheels, each sling having a wooden spreader which extended above each set of wheels and about a foot outside each side of the vehicle; that the vehicle had been lowered athwartship to about a foot above the deck of the lower hold; that cases of canned goods had been stowed in the after part of the lower hold forward to a point about under the after coaming at the third platform deck and extended to the side of the ship; that there was a munition bulkhead at the forward end of the hold that extended almost the complete width of the ship; and assume the overhead girders existed as described by Lieutenant Commander L'lanso and Mr. Gillespie, and that there was in No. 1 lower hold the equipment and gear described by Mr. Gillespie; whether or not in your opinion, Mr. Brew, the vehicle could be stowed with reasonable safety under those circumstances?

Mr. Rassner: I would like to enter an objection here on the ground that under no circumstances can the ship delegate away responsibility to provide a reasonably safe place for the stevedore to work, and therefore this question is entirely irrelevant, incompetent and immaterial.

The Court: The objection is overruled. You may answer.

A. Yes, it could be safely done.

Q. Will you describe the method which in your opinion would accomplish it in a reasonably safe manner?

Mr. Rassner: I object to that on the same ground.

[fol. 78] The Court: The objection is overruled.

Mr. Rassner: Exception.

A. I would like to ask counsel one question, where they had determined on stowing that vehicle?

Q. I would like you to assume on the facts that I have given you the stowage of it in any place where it would go.

A. The vehicle could be lowered into the hold athwartships, that is, with the forward end facing one side and, naturally, the aft end facing towards the other side, athwartships down to take advantage of the full width of the hatch on its greatest measurement, lowered right to the hold with perfect safety.

Q. Assuming it is hanging on the end of a sling and is about a foot from the tank top or tank top cover, and it becomes necessary or desirable to raise it, what in your opinion would be the proper method of doing it, and what if any precautions in your opinion should be taken?

A. The vehicle should be still athwartships, still out into the existing square of the hatch, which is of the measurement 10 foot by roughly 20 foot, with everything being properly clear, the spreaders included, clear of the beam or the underside of the coaming on the after side.

Q. To change the facts slightly, assume that the vehicle had been so moved as to bring it, or a part of the spreader, under the beams; under those circumstances what in your opinion are the precautions which should be taken before the vehicle is raised?

Mr. Rassner: I object to that as a hypothetical question which does not accurately state the facts.

The Court: The objection is overruled.

A. The common practice when there is any necessity [fol. 79] for work of that nature where there would be a part under a beam, is to ascertain whether or not the beam is fast and cannot be unshipped.

Q. If in the course of loading such a vehicle there was a possibility that it might be required to be raised, what in your opinion was the proper precaution to be taken with reference to the securing of the beam?

A. The foreman, having cognizant of the fact that there was no pull on the beam, should have made the beam fast in its socket.

Mr. Ash: I move to strike that out. That was not incorporated in the question and is a voluntary statement and an assumption by the witness.

By the Court:

Q. You say the foreman; you mean the hatch boss of No. 1?

A. Yes.

Q. Mr. Brew, when you said the foreman being cognizant of the fact that there was no locking device, whatever it might be, on the beam, did you refer to Di Mare, who was the boss of hatch No. 1?

A. Yes, he was in charge.

Q. What is he called, foreman or boss?

A. Hatch foreman.

The Court: I will allow it to stand, because Di Mare in his deposition said that he had observed the missing lock before they commenced to work. You may have an exception.

By Mr. Fanning:

Q. In the absence of any built-in locking device, what [fol. 80] method in your opinion was a desirable one to follow in securing the beam, assuming you are going to leave it in and there is no built-in device on it?

A. Might I ask counsel the depth of the coaming below the bottom of the beam?

Q. The testimony has been 30 inches.

A. In that case with the hole in the beam, the simplest device would have been two hooks under the coaming set taut with rope, with two half-hitches made in the rope and it would have been perfectly safe, as the hooks would be under the coaming and the strain would be upwards. I think I went ahead of the question. I said two hooks on the side without the pull. This hook would have an upward strain naturally if all the slack had been taken.

The Court: You mean if there was no locking device there were other methods which should have been provided to keep it fast?

The Witness: Yes, sir.

Q. What other means in your opinion might have been used to make the beam secure?

The Court: That is sufficient.

A. There are several others.

Mr. Rassner: May I enter my objection to this line of testimony as being entirely incompetent, irrelevant and immaterial. The question is if there was a defect there how the defect could be remedied or removed. It does not make any difference otherwise. The question is, was there a [fol. 81] defect there or wasn't there and how it could have been remedied.

The Court: I quite agree with you if there is an inherent defect, but if one observes that there is an inherent defect and he knows that as a result of that it is dangerous, or if whoever was in charge felt that that was a dangerous condition and there would be ways of securing that defect, temporarily if nothing else, should not steps be taken to remedy the situation?

Mr. Rassner: The answer is yes, but might I call something else to your Honor's attention in view of the fact that this is not the average negligence case where that question would be of importance. This is an admiralty case where there is only one proximate cause and if we have established that the proximate cause was a defective device the other contributory causes as distinguished from the average negligence case have absolutely no bearing on the case. That is in line with the Sunset case.

The Court: There is a lot in what you say.

Mr. Rassner: And it is for that reason I make my objection. Of course, I will abide by your ruling but I would like to have the record protected.

The Court: Yes, you may have it protected. However, I want to take hold of that.

Isn't that true, Mr. Fanning?

Mr. Fanning: I offer this evidence because I am going to argue to your Honor that the last and best chance of seeing that this thing did not happen was in the stevedore. [fol. 82] The Court: I assumed that your argument would be the last chance.

Mr. Rassner: I simply wanted to get a ruling to protect the record and that is all.

The Court: Certainly, I will give it the weight that it is entitled to.

Mr. Ash: This is being offered as against the American Stevedores on the theory of the last clear chance. There is no suggestion in the petition of that as against us.

The Court: Maybe I am speaking a little too fast, but it appears to me at the moment that both of you are trying to pin it on one another.

Mr. Ash: No, I am in this position: Mr. Fanning has been very particular about the pleadings since the beginning. I came into this proceeding on a petition filed by the Government. If you will look at the petition, sir, you will find nothing to advise me that we assumed or took over any dangerous condition which we could have cured. The second paragraph of the petition says, "Your petitioner further alleges on information and belief that such injuries as the libelant sustained were de solely to the negligence if any negligence be established, of American Stevedores, Inc., the employer of the libelant, and the corporation which had contracted with your petitioner to load said vessel under written agreement dated July 24, 1942, providing in part as follows"; and then they quote from the contract, paragraph 10, "Your petitioner is informed and believes that the American Stevedores is a domestic corporation of the State of New York having its principal [fol. 83] place of business at 115 Liberty Street within this district, and was in charge of the operation of said winch and the loading of the vessel, and should be proceeded against herein and should be a party to this suit to complete the determination of the controversy." Now I do not believe that there is any allegation in there charging me with the fault that Mr. Fanning is now trying to adduce, nor is there any suggestion of the doctrine of the last clear chance or that we took over anything defective or anything along that line. He comes in and says, "It is solely your fault."

The Court: All right, let us look at it from a practical standpoint too, not just in a mere cold, bare way. It is visible from any standpoint that you are trying to pass the buck, in plain English, to Mr. Fanning is trying to pass the buck to you, and how much easier it would be if both of you were willing to carry that buck to a certain extent. Then the equity here would be easier for the Court to decide. If you did not get me, I will try to make it plainer.

Mr. Ash: No, I think it is very clear the thought that you are trying to express and get over to me, and I believe

I have received it. But the point I am making here, sir, is that a line of proof is now being offered against me of which I was not apprised nor brought into court upon.

Mr. Fanning: Of course, you were. You were charged with negligence. That is what I have been attempting to prove.

The Court: Look, Mr. Ash, as I said before, both of you [fol. 84] confine yourselves in a boat, and it is rocking, and both of you want to sit in it and you are trying to rock it over and you want to see who will go overboard first. That is the trouble.

Mr. Ash: I am willing to take a definite position on it, but some of my adversaries won't let me take a definite position on it.

The Court: You are not going to raise a surprise or anything like that, for if you are I will discount it. I mean I won't entertain it.

Mr. Ash: I say it is not admissible under his pleading.

The Court: Assuming that it is not, sitting in admiralty I am sitting as sort of a court of equity. In the absence of a jury I can take all that into consideration. I am not held down to the hard and fast rules of evidence. I don't think I am.

Mr. Ash: Oh, no, sir, you are not, and I would be the last person to urge that; but I do say this, I say that there is now being injected into this case a charge which was not injected by the pleadings under which I was not charged.

The Court: All right, give the Court some credit for being intellectual enough to sift it all out.

Mr. Ash: If I did not do that I would not have drawn it to your attention, but I think it is right to draw it to your attention and not be lulled into negative——

The Court: I shall try to do the best I know with what has come out. For the moment I believe I should let it in, because very likely I have let in a lot of other things. If [fol. 85] there was a jury sitting here I would not, and it gives me a clearer picture of the entire case.

Mr. Ash: The only way I could get this before your Honor at this time was to object. Now I anticipate that your Honor is going to take the proof because our courts want the proof in, because we have no new trial in admiralty, but I raise the point now so that your Honor will be cognizant of our position.

The Court: Did you say because you have no new trial in case I am reversed?

Mr. Ash: That is right, we do not come back here and retry it.

The Court: That is one thing, but I can be easily reversed if I do not get the point.

Mr. Ash: I would like to answer your Honor's question off the record.

The Court: Surely.

(Discussion.)

Mr. Rassner: May I have my exception now on the ground that there is only one proximate cause?

The Court: Certainly.

Q. (Read.)

A. The beam might have been made fast by passing a rope or wire from the hole in the beam down underneath the coaming and to the holes in the transverse floor support of the deck above, and made fast in a similar fashion by two half-hitches, and seizing a piece of rope yarn on to it so she would not pull loose. The thing should be well taut. Then he could take, if he had a beam clamp there he could take——

Mr. Ash: There is no evidence of a beam clamp.

[fol. 86] Mr. Fanning: Yes, there is.

Mr. Ash: He talked about a U-bolt.

Mr. Fanning: A U-bolt is a beam clamp.

A. (Continuing) He could take a sling from the hole in the beam leading down underneath the edge of the coaming over to the frame on the side of the ship, pass it through the ring in the beam clamp and make it fast.

Q. What in your opinion would be the effect of such apparatus on the security of the beam?

A. Absolutely secure if it was properly done.

Mr. Rassner: I have no cross examination.

The Court: Why don't you sit down then?

Mr. Rassner: I merely want to call it to your Honor's attention, but by that I do not mean to concede that I agree with the witness in his conclusion. I merely take the attitude that it is incompetent, irrelevant and immaterial.

Cross examination.

By Mr. Ash:

Q. Suppose you were in charge of this operation and you saw a beam with no locking catch device upon it?

A. Yes.

Q. Would you report it to the ship?

A. No, sir.

Q. You would not mention it to the ship?

A. You are asking me if I were the hatch boss?

Q. Yes.

A. I would immediately make that beam secure.

Q. I asked you if you would report it to an officer of the ship?

A. I would not take the trouble. It happens every day.

Q. What is the purpose of a lock catch, is it to hold the beam in place?

A. The purpose of a lock catch is purely something that [fol. 87] is put there by the builders of the ship. It is not mandatory by the United States Bureau of Navigation.

Q. Just a minute, you are not testifying here as the alter ego of the U. S. Local Board of Steamboat Inspectors?

A. No, sir, as a technical witness.

Q. Just answer the question, if we want the rules, we will get them, as to what they require. You would not report that condition to the ship, would you?

A. No, sir.

Q. Now I ask you to assume that with the knowledge that there was no lock catch the man in charge of the loading insisted that loading go on with that beam in place, would you say anything to him?

A. I hardly think I would. I would make the beam fast if I deemed it necessary on a straight loading job. It might not even be necessary.

Q. Then in your opinion there is not always a necessity to fasten a beam if it has not got a lock catch on it?

A. On a loading job it is not necessary. If there is no upward strain to unship the beam it is not necessary.

The Court: If there is no strain, you say. Wouldn't it jerk it up? Wouldn't it throw it up fast?

The Witness: Sir, if a draft became lost in the air and fell on that beam with tremendous force it is possible, very remotely possible, that the beam might buckle, but she would

never unship. It would have to be a force from underneath to pick her up.

Redirect examination

By Mr. Fanning:

Q. You mean forces going down entirely and not coming up?

A. Yes.

(Witness excused.)

[fol. 88] RESPONDENT'S EXHIBIT "G"

Extracts from Contract Between American Stevedores, Inc. and United States of America

This agreement, made and concluded in the City of New York, State of New York, this 17th day of July, 1942, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this agreement, and American Stevedores, Inc., a corporation organized and existing under the laws of the State of New York hereinafter referred to as the Stevedore.

Witnesseth:

That for and in consideration of the mutual and dependent promises hereinafter set forth, the parties hereto agree as follows:

1. The Stevedore agrees to load cargoes and in connection therewith to perform all the duties of Stevedore on any vessel which the contracting officer or his agent may designate at Staten Island Piers, 11-17, both inclusive and Bush Terminal Piers, 1-7, both inclusive, at the Port of New York upon the terms and conditions hereinafter set forth for the terms beginning the 1st day of July, 1942, and ending June 30, 1943.

* * * * * * *

* * * The Stevedore shall, at its own cost and expense, rig and unrig all gear, rigging and equipment necessary for loading heavy lifts when handled by ship's gear.

The stevedore shall take off and put on all hatches, beams and tarpaulines; load, shift and lay all dunnage other than [fol. 89] flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

. . . . . .

12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants.

13. The Stevedore shall at its own cost and expense carry the following insurance protection:

(a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees, and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled "Longshoremen's and Harbor Worker's Compensation Act" (Public #802).

(b) Liability to the public in the amount of $50,000.00 indemnity as respects bodily injury to or death of one person and subject to that limit for each person and in a total amount of $150,000.00 as respects bodily injury to or death of more than one person on account of any one accident.

. . . . . .

[fol. 90] RESPONDENT'S EXHIBIT M

U. S. S. Thomas Stone

Measurements

½ ton Weapons' Carrier
(Overall) 15' 11⅝" long, 7' 4⅛" high, 6' 3-13/16" wide. The height can be reduced to 5' 5⅛". Weight 4240 lbs.

½ ton Command Car
(Overall) 15' 9-13/16" long, 6' 11⅜" high, 6' 3-13/16" wide. Weight 5160 lbs. Height can be reduced to 5' 3⅜"

	Plan
Hatch Opening	
No. 3 Platform Deck—13′ 6″ fore & aft, 20′ 'thwartships	#157250
Hatch Covers	
Short Section—3′ 3″ x 17-1/16″ wide x 3¼″ thick	#157250
Long Section—10′ 7″ x 17-1/16″ wide x 3¼″ thick	#157250
Hatch Beams	
19′ 11½″ long, 21.14″ deep, 9.03″ across top	#108–15
Beam Ends 12″ deep	#108–15
Channel Stanchion—lower hold	
2′ 6″ wide	#160164
Vertical Ladder—lower hold	
1′ wide	
Port upright—6″ from center line of ship	#160164
Fore and Aft Bulkhead—lower hold	
15′ 6″ from after side of channel stanchion to 'thwartship bulkhead at frame #45	#160164
[fol. 91]	
Starboard side lower hold	
From the starboard upright of the vertical ladder to the starboard side of the ship 12′ 4½″	#160164
Tank Top Covering	
5″ Fir on tank top under hatch	#160164
Depth of No. 1 Hold	
43′ 7″—Main Deck—Plating to tank top covering	#157325 and #160164
Clearance underneath side of forward beam No. 3 platform deck to wooden tank top covering.	
Watertight bulkhead frame 32, 9′ 4″	#157195
'Tank Top Covering 5″	
plus Depth of forward beam 21.14 2′2″	
7′2″	#160164
Brow Piece—3rd Platform Deck	
3′ high x 12″	#108–15

[fol. 92] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA, Respondent,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded

APPEARANCES:

Jacob Rassner, Esq., Proctor for Libelant.

Hon. John F. X. McGohey, United States Attorney; Proctor for Respondent; Howard F. Fanning, Special Assistant, of Counsel.

Alexander & Ash, Esqs., Proctors for Respondent-Impleaded; Edward Ash, Esq., of Counsel.

OPINION OF MANDELBAUM, D. J.—Filed December 6, 1944

MANDELBAUM, D. J.:

The libelant is a longshoreman employed by the American Stevedores, Inc., the respondent-impleaded, and was injured on September 23rd, 1942, while engaged in loading [fol. 93] the vessel "U. S. S. Thomas Stone" owned by the respondent, United States.

During the course of this loading, the libelant working in hold #1 below the third platform deck of the aforesaid vessel was struck and severely injured by the falling of a strongback or 'thwartships beam used to help support the hatch covers. The injury occurred while a motor vehicle was being lowered into the hold. So that the vehicle could be stowed properly, it became necessary to slightly raise it, and the order to do so was given to the winchman by a foreman, Di Mare, employed by the American Stevedores, Inc., the impleaded respondent. There was some delay and the order was repeated. This time the vehicle came up with a quick movement hitting against the beam and dislodging it causing it to fall and strike the libelant who was stationed underneath it.

The beams used for the purpose are fitted into slots on each side of the hatch coaming and are equipped with locking devices at each end to prevent their falling. The

evidence discloses that the beam which fell only had one such device, and that the foreman, Di Mare, who was in charge of raising and lowering the materials and equipment was aware of the missing lock. There was no proof, however, that the foreman was aware that this condition was so inherently dangerous or that it was necessary to remove the beam prior to working at that hatch opening.

The libelant takes the position that the failure to supply the locking device on the beam by the respondent was negligence.

The respondent, United States, maintains that the primary negligence of the stevedore acting through its foreman caused the beam to fall, and that the failure on the part of the shipowner to supply the locking device on the beam [fol. 94] did not constitute such active negligence as to hold the ship liable. I cannot agree with this contention. Were it not for the fact that the beam was so unsecure, because of the missing locking device, I am of the opinion from the proof submitted, that the striking of the spreader bear or of the vehicle itself against the beam would not have caused it to fall. It is the duty of the shipowner to provide reasonable security against injury to stevedores employed to work on the ship. *The Etna,* 43 F. Supp. 303.

The negligence of the stevedore consisted in the careless handling of the cargo and the manner in which the foreman ordered the winch to operate, without making sure that the vehicle was clear of the beam. There is nothing to indicate that the winch was defective, and the libel claiming a defect in the winch has been amended to strike out that charge.

I must accordingly find that both respondent and respondent-impleaded are negligent.

The contention of the government that no jurisdiction exists in this matter for failure to come within the provisions of the Public Vessels Act (46 U. S. C. A. 471) has been disposed of in a previous motion in this matter by Judge Coxe, reported in 53 F. Supp. 569.

The hospital records indicate that libelant suffered a broken back. The injuries suffered by the libelant, according to expert testimony seem to permanently incapacitate him from performing further heavy manuel labor, but do not prevent him from doing other work of a less strenuous nature. This partial total disability may be estimated at 25%.

The libelant up to the time of the injury maintained [fol. 95] an average earning capacity of $1500 per annum. Libelant has a life expectancy of 18 years. Loss of earnings since the injury amount of $3,000; hospital expenses amount to $581.77.

As a result of his injury he will suffer a loss of approximately 25% of his average annual salary or $375. Capitalized at 2½% and allowing for exhaustion involved in occupations such as longshoremen where manual labor is required the present value of the income is $6,000. Together with pain and suffering to date of $1,000, pain and suffering he will incur in the future valued at $1,000, and the loss of earnings to date of $3,000, and hospital expenses of $581.77, his total damages amount to $11,581.77.

The libelant has accepted the sum of $1421.77 by way of compensation. I have already ruled at the trial of the action that the acceptance of such compensation in this case was not a bar to the recovery of a judgment. The sum received by the libelant shall be deducted by the American Stevedore Inc. who advanced the payments, from any payments to be made to libelant in satisfaction of the judgment herein.

A decree will accordingly be entered in favor of the libelant against both respondent and the respondent-impleaded in the sum of $11,581.77.

The following are the court's findings:

FINDINGS OF FACT

1. The respondent failed to provide a safe place for libelant to perform his work.

2. The 'thwartship's beam contained only one locking device and was therefore defective.

[fol. 96] 3. The stevedore, respondent-impleaded, through its foreman, negligently and carelessly handled the cargo in loading.

4. The injuries sustained by the libelant were a result of the negligence of both respondent and respondent-impleaded.

5. The libelant is suffering from a permanent partial disability.

6. The libelant did not accept compensation payments under an award of a deputy commissioner.

CONCLUSIONS OF LAW

1. The libelant did not accept compensation payments so as to preclude his bringing suit.

2. Respondent was negligent in not providing the libelant with a safe place to work.

3. Respondent-impleaded was negligent in improperly loading the cargo.

Dated, December 4th, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 97] IN UNITED STATES DISTRICT COURT

AMENDMENT TO OPINION—Filed Dec. 21, 1944

MEMORANDUM

My opinion under date of December 4, 1944, is amended to the following extent:

Paragraph beginning with the words "A decree" and ending with the amount "$11,581.77," on page 5, is modified to read:

"A decree will accordingly be entered in favor of the libellant against United States of America for the full amount of libelant's damage $11,581.77. The decree shall provide that the United States of America shall have contribution from American Stevedores, Inc., respondent-impleaded, for one-half of the amount so paid."

Dated: December 18th, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 98] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Admiralty 127-36

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA, Respondent, and AMERICAN STEVEDORES, INC., Respondent-Impleaded.

FINAL DECREE

This cause having duly come on to be heard in its regular order on November 6, 8, 9 and 10, 1944, upon the pleadings

and proofs adduced by the respective parties and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its opinion in writing finding both respondent, and respondent impleaded negligent and directing that the libelant recover from the respondent, United States of America, the damages sustained by it by reason of the matters and things set forth in the libel, and that the respondent, United States of America, have contribution from the respondent-impleaded, American Stevedores, Inc., for one half the total damages decreed, and having further directed [fol. 99] that the sum of $1,421.77 received by the libelant by way of compensation from the respondent-impleaded, American Stevedores, Inc. be deducted from any payments to be made to libelant in satisfaction of the judgment herein, and the costs of libelant having been taxed at the sum of $137.62,

Now, on motion of John F. X. McGohey, Proctor for the respondent, United States of America, it is

Ordered that the opinion of the Court, heretofore filed herein on the 6th day of December, 1944 together with the findings of fact and conclusions of law therein contained be and hereby is adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½; and it is further

Ordered, adjudged and decreed that the libelant, Rosario Porello recover of and from the respondent, United States of America, the sum of $11,581.77, the amount of the damages sustained by the libelant, together with the sum of $137.62, costs of the libelant as taxed, amounting in all to the sum of $11,719.39, less the sum of $1,421.77 heretofore paid to libelant, by way of compensation by respondent impleaded, American Stevedores, Inc., leaving a net balance of $10,297.62 and is further

Ordered, adjudged and decreed that the respondent, United States of America, recover from the respondent-impleaded, American Stevedores, Inc. one half the total damages decreed incluing costs, ie., one half of $11,719.39 or $5,859.70 less $1,421.77 leaving a net balance of $4,437.93.

Dated, New York, N. Y., December 19, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 100] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 16, 1945

United States of America, the respondent herein, hereby assigns error in the proceedings, findings of fact, conclusions of law and the decision and decree of the United States District Court for the Southern District of New York, in the above suit in the following particulars:

1. In ruling that the decision of Judge Coxe on this respondent's exceptive allegations determined the question of jurisdiction under the Public Vessels Act, 46 U. S. C. 781.

2. In failing to dismiss the libel for lack of jurisdiction.

[fol. 101] 3. In entering a decree against this respondent.

4. In ordering stricken from the answer of this respondent, the allegations with respect to the effect of the Longshoremen's and Harbor Worker's Compensation Act.

5. In finding and ruling that this respondent was negligent.

6. In finding and ruling that this respondent failed to furnish the libellant with a reasonably safe place in which to work.

7. In finding that it was necessary to raise the automobile in order to stow it properly.

8. In finding that beams such as that in use at the time of the accident are required to be equipped with locking devices at each end to prevent their falling.

9. In finding that beams such as that in use at the time of the accident are equipped with locking devices at each end to prevent their falling.

10. In finding that the absence of a locking device on the beam contributed to the happening of the accident.

11. In failing to find that American Stevedores, Inc., respondent impleaded, prior to the time loading commenced at No. 1 hatch, knew that the beam at the third platform deck, which was left in place, was not equipped with a locking device.

[fol. 102] 12. In failing to find that American Stevedores, Inc. neither secured the beam nor made any request of the officers of the ship to secure it.

13. In failing to find that American Stevedores, Inc., in raising the vehicle immediately prior to the time the beam was unshipped, was under the duty to see that the spreader and truck would clear the beam or if it would not that American Stevedores, Inc. was under a duty to secure it.

14. In finding that the beam which fell was equipped with a locking device at one end and not on the other end.

15. In finding that the beam which fell was defective.

16. In finding that Mr. Di Mare was not aware of such dangers as attended the operation under the conditions existing.

17. In failing to find that the negligence of the employees of American Stevedores, Inc. was the sole cause of the accident.

18. In failing to find that American Stevedores, Inc. failed in its duty to this respondent to use reasonable care in the performance of the work.

19. In failing to find that the negligence of this respondent, if any, was only passive and that this respondent was entitled to full indemnity from American Stevedores, Inc.

[fol. 103] 20. In failing to rule that this respondent was entitled to full indemnity from American Stevedores, Inc. under the contract, Exhibit G.

Dated: New York, N. Y., March 26, 1945.

John F. X. McGohey, United States Attorney, Proctor for Respondent, Office & Post Office Address, 45 Broadway, New York, N. Y. (6).

[fols. 104-105] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

In Admiralty, No. 96

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant.

Appendix for American Stevedores, Inc., Respondent Impleaded—Appellee and Appellant—Filed October 22, 1945

[fol. 106] LIBELANT'S ANSWERS TO RESPONDENT'S INTERROGATORIES *

[Title omitted]

Libelant, answering the interrogatories propounded by Respondent-impleaded, states and alleges as follows:

1. Yes.

2. I have received voluntary payments at the rate of $20.00 per week until approximately April 7, 1943, without any formal award by a deputy commissioner.

3. I filed no claim for compensation.

4. I attended no conference, regarding my claim. On or about August 3, 1943, I submitted to a physical exam-
[fol. 107] ination. On March 30, 1943, I filed a notice of election to sue. On or about August 12, 1943, I again in-

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* Respondent's Interrogatories are printed on page 29A of the United States Appendix.

formed the Compensation Commission that I was proceeding with my third party claim.

5. Approximately March 30, 1943.

Dated, New York, September 28, 1944.

Yours, etc., Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

To: Alexander & Ash, Esqs., Proctors for Respondent-Impleaded, 76 Beaver St., New York City.

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF MINUTES

Mr. Ash: If your Honor please, I represent the American Stevedores, Incorporated, which, as Mr. Fanning states, has been brought in under the 56th rule in Admiralty. I assume that there can be, under no factual situation that can be proven here, any decree in favor of the libellant against the American Stevedores because his exclusive right as against us is under the U. S. Longshoremen & Harbor Workers Act. So that any liability that we may have is a liability over to the respondent but none direct to the libellant.

[fol. 108] I think the factual situation has been given to your Honor sufficiently so that you will not require any amplification from me at this time. I do not wish to discuss the question of the defense of compensation that we have set up at this time, unless your Honor desires to hear from me on that point, but I wish to say that I intend or hope to prove that there was a conscious acceptance of compensation by this libellant here after he knew that he had a right of cause of action against the third party, the United States.

Now that I think is a little different than some of the other cases that have been before this District Court, and that is, I hope to show that this suit was started I think on March 30th and until July the libellant continued to receive and accept and has obtained compensation payments, so that he took such compensation payments after he knew that he had a right of action against

the third party. And I say that that constitutes an irrevocable election. I do not argue that there has been any assignment of this cause of action which would require an order merely that there has been an election of his exclusive remedy.

Mr. Rassner: May I call your Honor's attention to the fact that Mr. Ash evidently overlooks that after the carrier, that is after March 26, 1943, after the carrier was put on notice that we intended to proceed against a third party, they voluntarily continued making payments, which is the custom with several companies, and that is in no wise by any order. It is just voluntary payments that they may or may not pay as they see fit. They had absolute notice in writing that we intended to proceed with the third party action.

* * * * * * *

FRANK IGNERI, for libellant.

Direct.

Q. What I am trying to find out is, what was said, what was the talk between the Army officer and Di Mare?

A. To take the beams off.

[fol. 109] Q. Tell us what was said.

A. They want to take the beam off and put it on top of them. Di Mare wanted to take the two beams out. The Army officer says, "Leave the other one stay, you got plenty of room on board."

* * * * * * *

Q. So you had about half the hatch open?

A. More than half, a little.

* * * * * * *

Q. Half of it was left closed?

A. That is right.

Q. Let me see if I have you correctly. The Army officer, is that the man you say told you——

A. No, not told me.

Q. Told who?

A. Told the hatch boss.

Q. Told Di Mare?

A. That is right.

Q. To take off one beam?

A. That is right.

Q. Where did he say he should put it?
A. On top of the far end.

• • • • • • •

Q. How about the Army officer, was he there the next day?

A. Yes, he was there all the time. He used to give us orders, even, how to stow cargo down the hatch, to the hatch boss; he used to give plenty to the hatch boss, how to stow cargo.

Q. Was it the same Army officer, the same one on the next day who was giving orders where to stow cargo?

A. From him. There was no——

Q. Was he there all through the work?

A. All through the work.

Q. Did anybody else come over and give orders?

A. No, just him.

Q. Just the one man?

A. That is right.

• • • • • • •

JAMES J. HESSION, for libellant.

Direct.

Q. Isn't it customary to take out the forward beam?

A. It is customary.

[fol. 110] Q. Will you tell us, if you know, why that beam was not taken out?

A. We were ordered to load the ship in a quick a time as possible and it was not necessary for it to come out.

Q. Who gave those orders?

A. I am quite sure that Fay gave them to us.

Q. Did you have anything to say about taking that beam out?

A. No, I didn't at the time, no.

Q. Was that beam left there under his specific orders or under general orders?

A. He was constantly around on the ship's side and he seen operations that was going on at the time.

• • • • • • •

Q. How about supervision and direction of orders?

A. The exact supervision of the ship became a matter for Captain Fay and this Army officer that came, as I say, from Washington.

Q. Now, was that unusual, that procedure?

A. In this particular case, yes; it was an unusual ship because it was an invasion ship.

* * * * * * *

Mr. Rassner: May it be stipulated on the record that the doctor and hospital bills in this case amount to $581.77?

The Court: Yes.

Mr. Ash: They were paid by the American Stevedores, Inc. or in its behalf by the Compensation Insurance Company—they were not paid by the libellant—under the Federal Compensation Law or pursuant to the Federal Compensation Law.

* * * * * * *

FRANCISCO J. L'LANSO, for respondent.

Cross.

Q. Is it not also true that in loading or unloading operations in a hold such as hold No. 1 here, that drafts will, when bring raised up or when being maneuvered in the hold—[fol. 111] that either part of the sling or sometimes part of the ship's gear will come up against the crossbeam?

A. If the cross-beam is in place, yes.

Q. Of course, if it is not there, they cannot come up against it. I am assuming it is in its place. That occurs almost every time that there is loading and unloading of a hold, is that not right?

A. Frequently so.

Q. When you are loading by means of spreaders, such as was being done in hold No. 1 on the day in question, there is a greater likelihood, is there not, that your draft and the spreaders will come up against a cross-beam than if you are loading a smaller unit of cargo in a draft?

A. That is correct.

Q. And is it not fair to say that a truck with spreaders being loaded into a hatch or into hatch No. 1 on this vessel, which is only partly opened, is a bulky cargo or draft to handle?

A. Yes, that is true.

* * * * * * *

Q. Was the Army in charge of the loading of the equipment?

A. There was an officer of the Quartermaster Corps, whose title was a "Troop Transport Quartermaster" in charge of loading the equipment.

Q. Not desiring to get tangled up in names which I cannot recall, was this Army officer whose rating you just gave us, was he in charge of the loading of the vessel on the day in question?

A. He was.

Q. And the loading was being done under his personal supervision, is that not correct?

A. That is correct.

* * * * * * *

Mr. Ash: May it be conceded that the respondent, American Stevedores, Inc., had by insurance with the American Mutual Liability Insurance Company, covered its employment at the time in question with the compensation, medical and hospitalization provided for in the U. S. Longshore-
[fol. 112] men's & Harbor Workers Compensation Act, and that the policy of insurance contained an endorsement known as the Longshoremen & Harbor Workers Compensation Act, and I offer a copy of the endorsement in evidence.

Mr. Rassner: The fact is conceded and the objection is made the same way, that it has no bearing on the case.

(Marked Respondent Impleaded's Exhibit O.)

Mr. Ash: May it be conceded that the libel was filed on March 29, 1943?

Mr. Rassner: That is a matter of record. You do not need a concession.

Mr. Ash: I would like to have it in the record. I agree that it is.

Mr. Rassner: It is so conceded.

Mr. Ash: And that payments were received by the libellant from the respondent, American Stevedore, Inc., or payments were made in the latter's behalf up to and including the payment of July 12, 1943, which covered the period from June 30, 1943, to July 30, 1943.

Mr. Rassner: That concession is made with this additional stipulation, that on or about March 26, 1943, libellant duly caused to be served upon the carrier and the employer a notice of intention to sue a third party.

Mr. Ash: I offer in evidence interrogatories Nos. 1 and 5 addressed to the libellant and the libellant's answers thereto.

Mr. Rassner: No objection.

Mr. Ash: With that I rest.

Mr. Rassner: At this time I respectfully move the Court to strike out the answers of both respondents in so far as [fol. 113] they deal with the question of compensation, in view of the fact that the evidence as disclosed at this trial shows that there has been no acceptance of compensation payments pursuant to an award made by a deputy commissioner as provided by Title 33, Section 933, subdivision (b) of the Longshoremen and Harbor Workers Act.

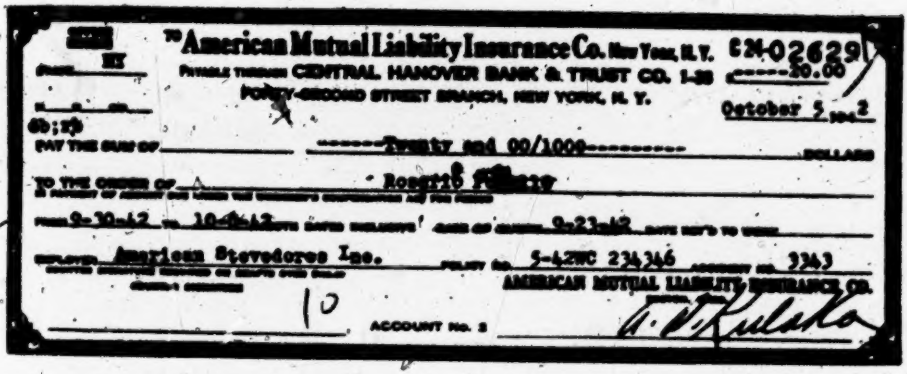
The Court: I am inclined to grant that motion, unless you can prove to me by some other law that I am wrong on it.

EXHIBIT H (RESPONDENT-IMPLEADED)

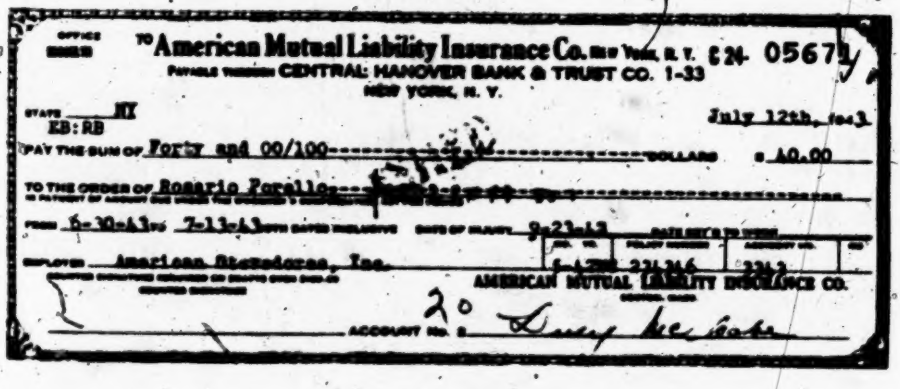
See next page

(Only the First and Last of the Compensation Checks are herein Reproduced.)

(All of the checks payable to libellant were endorsed and cashed by him.)



To American Mutual Liability Insurance Co. New York, N.Y. C24-02629
STATE NY
PAYABLE THROUGH CENTRAL HANOVER BANK & TRUST CO. 1-33
FORTY-SECOND STREET BRANCH, NEW YORK, N. Y.
$ 20.00
October 5 1942
db;rb
PAY THE SUM OF ------Twenty and 00/100---------- DOLLARS
TO THE ORDER OF Rosario Forello
FROM 9-30-42 TO 10-6-42 DATES PAYED INCLUSIVE CAUSE OF CANCEL 9-23-42 DATE SENT TO INSD.
EMPLOYER American Stevedores Inc. POLICY NO. 5-42WC 234346 ACCOUNT NO. 3343
AMERICAN MUTUAL LIABILITY INSURANCE CO.
10
ACCOUNT No. 3
A. C. Kulaka



To American Mutual Liability Insurance Co. New York, N.Y. C24 05671
PAYABLE THROUGH CENTRAL HANOVER BANK & TRUST CO. 1-33
NEW YORK, N. Y.
STATE NY
EB:RB
July 12th, 1943
PAY THE SUM OF Forty and 00/100---------- DOLLARS $ 40.00
TO THE ORDER OF Rosario Forello
FROM 6-30-43 TO 7-13-43 DATES PAYED INCLUSIVE CAUSE OF CANCEL 9-23-43 DATE SENT TO INSD.
EMPLOYER American Stevedores, Inc. POLICY NO. 5-42WC 234346 ACCOUNT NO. 3343
AMERICAN MUTUAL LIABILITY INSURANCE CO.
20
ACCOUNT No. 3
Daisy McCabe

Exhibit O (Respondent-Impleaded).

LONGSHOREMEN'S—HARBOR WORKERS' COMPENSATION ACT ENDORSEMENT

Endt. No.

The obligations of Paragraph 1 (a) of the Policy include the Longshoremen's and Harbor Workers' Compensation Act, being Public Act No. 803 of the 69th Congress, approved March 4, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

The Company will carry out the provisions of Section 26 of said Act. Insolvency or bankruptcy of the employer and/or discharges therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders, and decisions of the United States Employees' Compensation Commission and of the Deputy Commissioner having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

If this Employer is a contractor the subject of whose contract includes operations covered by this Policy and he shall sub-contract all or any part of such contract to one or more sub-contractors the remuneration of all the direct employees of all such sub-contractors shall be included in the terms of remuneration under the provisions of this Policy upon which premium is computed. Such remuneration as reported shall be considered the remuneration of employees of this Employer and shall in all business be governed by the same terms, conditions, requirements and obligations of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply as regards any such sub-contractor who has secured compensation for his direct employees as required by the Longshoremen's and Harbor Workers' Compensation Act but this Employer shall not claim the benefit of this exemption unless and until he shall notify the Company by certification or otherwise that any such sub-contractor has legally secured the payment of compensation to his own direct employees and then only respecting any sub-contractor who has furnished such proof.

This endorsement shall not be cancelled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer.

All terms, conditions, representations and obligations expressed in this Policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

Reference to the law of any state in Conditions B and D of this Policy are hereby declared to include, for the purposes of this endorsement only, the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

This endorsement is effective May 1 19 42 at 12:01 A.M., standard time at the address of the insured as described in the declarations, and is attached to policy no. WC 234 146-B issued to Dorrance-Sturgis, Inc.

expiring May 1 19 43

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

J. P. Mullaney
Secretary

Charles E. Hodges
President

FEDERAL

Countersigned Victor A. Trundy
Authorized representative

[fol. 117] [Title omitted.]

ASSIGNMENT OF ERROR OF AMERICAN STEVEDORES, INC.

The American Stevedores, Inc., respondent-impleaded in the above entitled proceeding, hereby assigns error in the proceedings, decrees, order of the District Court in the above entitled action, as follows:

1. In that the District Court failed to find that the libellant was precluded from maintaining any suit or proceeding herein by reason of his acceptance from his employer, the American Stevedores, Inc., of compensation under the provisions of the U. S. Longshoremen's & Harbor Workers Compensation Act, 33 U. S. C. 905, et seq.

2. In that the Court failed to find and adjudge that libellant's exclusive remedy was under the said enactment.

[fol. 118] 3. In that the District Court dismissed the first, separate and distinct defense set forth in paragraphs Ninth to Thirteenth inclusive of the answer of the American Stevedores, Inc., to the amended libel and to the petition of the United States of America.

4. In that the District Court held that the United States of America was entitled to indemnity from the American Stevedores, Inc. and entered a decree so adjudging.

5. In that the District Court held that the said American Stevedores, Inc. was liable over by way of indemnity or otherwise, to the United States and that it had violated some obligation or duty owing to it.

Dated, New York, March 15, 1945.

Alexander & Ash, Proctors for American Stevedores, Inc., respondent-impleaded, cross-appellant, 76 Beaver Street, New York City.

[fol. 119] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

(Argued November 14, 1945 Decided January 10, 1946.)

Docket No. 19904

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Before: L. Hand, Swan and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Libel for damages for personal injuries sustained by the libellant aboard a public vessel of the United States, wherein the respondent impleaded the libellant's employer, [fol. 120] American Stevedores, Inc. From a final decree awarding recovery against the respondent and adjudging that it have contribution from American Stevedores, Inc. for one-half the libellant's damages, less certain credits, both the respondent and the impleaded respondent have appealed. Decree modified.

John F. X. McGohey, United States Attorney, for respondent-appellant; Howard F. Fanning and Thomas H. Walker, of counsel.

Alexander & Ash, Proctors for impleaded respondent-appellant; Edward Ash, Advocate.

Jacob Rassner, Proctor for appellee.

SWAN, *Circuit Judge:*

This is a suit brought under the Public Vessels Act, 46 U. S. C. A. § 781, against the United States to recover damages for personal injuries sustained by a stevedore, while stowing cargo in the hold of the Navy Transport

"Thomas Stone." The libellant was in the employ of the impleaded respondent, American Stevedores, Inc., which was engaged under contract with the United States in loading the vessel. He was seriously injured by the falling of a strongback from the hatch of the third platform deck into the No. 1 lower hold. The district court held the vessel owner at fault for supplying a strongback which was defective in that it lacked the customary locking device on one end, and held the stevedoring company at fault because its foreman negligently loaded the cargo in a manner which caused the strongback to be unshipped. The libellant was given a decree against the United States for [fol. 121] $11,719.39, less $1,421.77 already received by way of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 *et seq.*, and the United States was given contribution from American Stevedores, Inc., for one-half the damages less the above mentioned credit. Both the United States and the stevedoring company have appealed.

The United States contends (1) that the suit does not lie under the Public Vessels Act, (2) that the absence of a locking device on the strongback was not the proximate cause of the accident, and (3) that, if liable to the libellant, it is entitled to complete indemnity from the impleaded respondent. The latter contends that the decree is wrong in awarding contribution to the United States in any amount. The libellant has filed assignments of error asserting inadequacy in the award of damages and asks us to increase it.

The question of jurisdiction under the Public Vessels Act was raised by exceptions to the libel. They were overruled in *Porello* v. *United States*, 53 F. Supp. 569. Any doubt as to the correctness of that ruling is set at rest by the recent decision of the Supreme Court in *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228 where the court said that the statute was intended to impose on the United States the same liability imposed by the admiralty law on the private shipowner. That a private shipowner would be liable to a stevedore for personal injuries caused by defective equipment or negligence is elementary. *La Guerra* v. *Brasileiro*, 124 F. 2d 553 (C. C. A. 2, cert. den. 315 U. S. 824; *U. S. Fidelity & Guaranty Co.* v. *United States*, 152 F. 2d —— (C. C. A. 2, Nov. 9, 1945). The district judge found that the failure to have

a lock on the strongback was negligent. The evidence [fol. 122] supports this finding. Such a lock is customary, and the plans of the vessel called for it; but no lock was installed and its lack was visible to the naked eye. The United States really offers no excuse for its failure, but contends that the proximate cause of libellant's injuries was the negligence of the stevedoring company.

At the time of the accident the libellant was one of a gang of stevedores stowing cargo in No. 1 lower hold. The work was in charge of Di Mare, foreman of the gang. A military vehicle had been lowered into the hold and landed on the tank top preparatory to stowing it in the starboard wing aft. The vehicle was handled by wire slings, the perpendicular parts of which were separated by wooden spreaders above the top of the vehicle to prevent the wire from scraping it. After the vehicle was landed Di Mare ordered the winchman to "pick it up a little." As the vehicle did not move, in response to the order, it was repeated. The raising of the vehicle unseated the strongback, causing it and a number of the hatch cover planks to fall into the hold and hit the libellant. Di Mare, the foreman, knew that the lock was missing and should have realized the danger of unseating the strongback, if the vehicle was raised. The trial judge found Di Mare was negligent in handling the draft, and that the libellant's injuries resulted from the negligence of both the respondent and the stevedoring company. Each wrongdoer claims that the other's negligence was the sole cause of the accident. The United States argues that its fault created a situation which was harmless while cargo was being lowered into the hold and only became dangerous by reason of the supervening negligence of the gang foreman in ordering the vehicle to be raised in such a manner as to unseat the strongback. In support of the argument counsel cites *The M. E. Luckenbach*, 200 F. 630, aff'd 214 F. 571 [fol. 123] (C. C. A. 2); *The Sunnyside*, 251 F. 271 (C. C. A. 2); *The Mars*, 9 F. 2d 183 (S. D. N. Y.); *The Aden Maru*, 51 F. 2d 599 (S. D. Texas). The stevedoring company, on the other hand, argues that had the beam been locked, the raising of the vehicle against it would not have unshipped it and consequently the absence of the lock was the efficient, *i. e.*, proximate, cause of the accident. The unsound notion that there can be but one "proximate cause" of an accidental injury has caused some confusion

in the cases. None of the authorities cited is applicable to the facts at bar. In our opinion the absence of the lock and Di Mare's negligent order operated concurrently in producing the result. Hence both the tort-feasors would be jointly and severally liable and each should bear one-half the libellant's damages except for the statutory immunity granted by section 5, 33 U. S. C. A. § 905, which makes the compensation liability exclusive with respect to the employer.

For a right of contribution to accrue between tort-feasors, they must be joint wrong-doers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A. L. I. Restitution § 86; 13 Am. Jur., Contribution § 51. Since the libellant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay. See *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S. W. 2d 16, 85 A. L. R. 1086; *Walker-Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N. W. 721, 92 A. L. R. 680. It claims full indemnity by reason of its contract with American Stevedores, Inc. This required the stevedoring company to carry insurance protection against liability to its employees arising under the Longshoremen's and Harbor Workers' Compensation Act; and contained also the following provision:

> [fol. 124] "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants."

The impleaded respondent argues that the provision must be construed as though the final clause read "through the negligence or fault of the Stevedore alone"; that it did not agree to indemnify the United States against damages to which a defect in the ship's equipment contributed. But we do not think the contract can be limited to negligence or fault for which the stevedore alone was liable. The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured. It is reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and the shipowner

are at fault. See *United States* v. *Wallace*, 18 F. 2d 20, 21 (C. C. A. 9). The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision was inserted in the contract for that purpose. The United States argues that, even without such a provision, it would be entitled to full indemnity. See *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Burris* v. *Am. Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2); *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co*, 32 F. [fol. 125] 2d 886 (C. C. A. 9). However that may be, we think the contract entitles it to full indemnity and the decree must be modified accordingly.

American Stevedores, Inc. in its answer pleaded that the court lacked jurisdiction to grant any recovery to the libellant because by accepting compensation payments he elected to pursue his remedy under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 933(a). According to paragraph (a) of section 933 the election is to be made "by giving notice to the deputy commissioner in such manner as the commission may provide"; no other method of election is specified. The effect of accepting compensation payments is prescribed in paragraph (b) of the section. Before the 1938 amendment of paragraph (b), mere acceptance of compensation operated as an assignment to the employer of the employee's cause of action against a third person; since the amendment, the acceptance must be "under an award in a compensation order" to effect such an assignment. See *Grasso* v. *Lorentzen*, 149 F. 2d 127, 128 (C. C. A. 2), cert. den. 14 Law W. 3128. In the case at bar, the libellant filed no claim for compensation but did file on March 30, 1943 notice of election to sue the third party. His acceptance of voluntary payments of compensation without any award did not, in our opinion, impair his capacity to sue. Cf. *Ross* v. *C. D. Mallory Corp.*, 1943 A. M. C. 729 (N. J. Sup. Ct.).

Finally, we come to the libellant's contention that the damages awarded him were inadequate. Although the

libellant did not appeal, he filed assignments of error pursuant to Rule 38(3) of the rules of this court. An appellate court may increase an award in admiralty. *Standard Oil Co.* v. *Southern Pac. Co.*, 268 U. S. 146, 155; *The Spokane*, 294 F. 242 (C. C. A. 2), cert. den. 264 U. S. 583; *Browne* v. *Great Lakes Transp. Corp.*, 5 F. 2d 58 (C. C. A. 2). The [fol. 126] district court's opinion states that the damages awarded were composed of the following items: Pain and suffering to date $1,000; future pain and suffering $1,000; loss of earnings to date $3,000; present value of future loss of earnings $6,000; hospital expenses $581.77—a total of $11,581.77. At the date of the accident September 23, 1942 Porello was 55 years old, which gave him a life expectancy of 17 years. His earnings for the year preceding the accident were $3,000, but the trial judge found that his average earnings were $1,500. He found also that his injuries "permanently incapacitate him from performing further heavy manual labor, but do not prevent him from doing other work of a less strenous nature." and estimated his disability to be 25%. In computing the loss of future earnings the district judge took $375 as the annual loss and capitalized it at 2½% for the full life expectancy. It is clear from the medical testimony that putting the disability at 25% was much too low. The man was incapable of any active work and there is no evidence that he had qualifications which might fit him for an office job. We think a disability of 75% would be closer to the facts. The average earnings were also taken at too low a figure. The libellant's earnings from July 1, 1938 up to his accident in September 1942 show a yearly average of $1700. On the other hand capitalization at 2½% for 17 years was too favorable to the libellant both in respect to the rate and the number of years he could continue to do the heavy work of a stevedore. If we took an annual loss of $1275 (75% of $1700) capitalized at 3% for ten years, the present value of future loss of earnings would be $11,200. In computing future losses we think the trial judge was justified in taking the libellant's average yearly earnings rather than earnings for the year immediately pre-[fol. 127] ceding the accident. But in computing wages lost during the two years preceding the trial, in view of the demand for longshoremen's services during the war, of which we may take judicial notice, we think the allowance for this item should be $6,000 instead of $3,000. The allowance for pain, $2,000, seems unduly small in view of the

medical testimony. We raise it to $4,000. Making the corrections above suggested would give a total award of $21,781.77. The award of damages is increased to that figure.

The decree is modified in accordance with the foregoing opinion and, so modified, is affirmed.

[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES and WAR SHIPPING ADMINISTRATION, Respondent-Appellant; American Stevedores, Inc., Respondent-Impleaded-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court with costs, and as so modified, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 129] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello v. United States of America, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 10, 1946. Alexander M. Bell, Clerk.

[fol. 130] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 96

October Term 1945, in Admiralty

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Petition of American Stevedores, Inc., Respondent Impleaded, for a Limited Rehearing

On January 10, 1946, this Court filed its opinion written by Circuit Judge Swan, and concurred in by Circuit Judges Learned Hand and Frank, modifying the decree of the District Court (1) by increasing the damages found by the District Court and (2) directing that the United States recover full indemnity from the respondent impleaded, American Stevedores, Inc.

This petition for a rehearing is limited only to so much of this Court's opinion as directs complete, rather than one-half, indemnity by the United States against the American Stevedores, Inc. No other conclusion is sought to be considered upon such rehearing.

[fol. 131] A

This court has affirmed the findings of the court below that the negligence of both the respondent and respondent-impleaded concurred in causing the injury to libellant. In holding that contribution does not lie between these joint tort feasors *in admiralty*, this court proceeded on the theory that the statutory immunity granted by 33 U. S. C. A. §905, created no *common liability* in that libellant could not sue his employer and in support thereof cited *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wis. 519. These cases are inapplicable to this admiralty proceed-

ing. A reading of each will show that they were actions at law involving automobiles, the court in each construing local statutes. As was said in *The Tampico,* 45 F. Supp. 174, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution (p. 175):

> "The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. *The Hamilton,* 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; *The Atlas,* 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception (citation). Whatever its origin, the admiralty rule in this country is well known to be the other way (citations) * * *'. *Erie R. R. Co.* v. *Erie Transportation Co.,* 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450." (Italics supplied.)

[fol. 132] "The right to contribution belongs to the substantive law of admiralty. It is not a mere incident of a form of procedure"—Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.,* 218 U. S. 264, 31 S. Ct. 17. Procedurally, the libellant in this case could not bring a direct action against his employer but certainly, by virtue of the libellant's injury, *a common liability was created because of the joint tort.* The libellant's *remedies* against the joint tort feasors do not characterize the liability. The right to contribution is a consequence of the joint tort and attaches to the joint liability. *Benedict on Admiralty* (6th Ed.), Vol. 2, §353, p. 552.

The right to contribution, *in admiralty,* does not depend upon a common liability or remedy to the party injured. Thus, we see that under the Harter Act the cargo owner has no remedy against the carrying vessel for errors in navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carry-

ing vessel one-half of the damages paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be sued directly by the cargo owner. *In re United Steel Products Co.* (C. C. A. 2), 24 F. (2d) 657; *The Chattahoochee*, 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394. As was said in *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173, "It (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" To same effect, see *The Mariska* (C. C. A. 7), 107 F. 989.

As recently as October 1945, Circuit Judge Learned Hand wrote in *Barbarino* v. *Stanhope S. S. Co.*, 151 F. (2d) 553, where the parties were identically situated as in the instant suit, that the shipowner, whose impleading petition had been dismissed by the Trial Court, had a very real interest to hold in the stevedore-impleaded in order to obtain contribution. The Court said (p. 555 of 151 F. 2d):

> [fol. 133] "Whether that would be enough interest to support an appeal we need not decide, *because the suit is in admiralty where contribution between joint tort feasors has existed since 1875. The Alabama*, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

The fact that there is a statutory immunity from direct suit by the libellant does not militate against contribution, if, as has been held here, the stevedore be a joint tort feasor. As was said in *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, where a shipowner in an independent admiralty action sought indemnity or contribution for payments made to respondent's employee (p. 305):

> "If the longshoreman's right of action against the vessel was not taken away by the Act, he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damage has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

Also in *The Tampico* (pp. 175, 176 of 45 F. Supp.):

> "The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshore-

man's) injuries furnishes no defense against Hedger's (Shipowner's) claim to contribution as between joint tort-feasors."

Therefore, *irrespective of contract,* under the substantive law of admiralty, in contradistinction to any other body of law, contribution exists in the instant action, the parties initially having been found to be joint tort feasors.

[fol. 134] B

The interpretation given by this Court to the indemnity provision is not only against authorities in this and other circuits, but virtually makes the stevedore an insurer of the negligence of the shipowner. If this interpretation prevails, not only is every shipowner *indemnified in toto for its own negligence,* no matter how gross, but the stevedore can never obtain insurance coverage, whether P & I or compensation, as it has assumed by contract a risk which makes it a guarantor of the performance of some third party. The interpretation of this contract, as now made by this Court, will not only foster and perplex litigation in the shipping industry but will reach out, encompass, and govern every conceivable industry wherein independent contractors are in privity by virtue of contract. In arriving at this interpretation of the contract, this Court cited *United States* v. *Wallace,* 18 F. (2d) 20. However, this court may have overlooked the holding in the cited case. *There the United States, shipowner, was held solely at fault* since its workmen caused the injury. In construing a United States Shipping Board contract, incorporating an indemnity clause similar to the instant one, the court, in denying indemnity in favor of the United States from its contractor, said that there must be expressed in *unequivocal* terms the intent of the indemnitor to indemnify for the indemnitee's negligence (p. 21 of 18 F. 2d). In *North American Ry. Const. Co.* v. *Cincinnati Traction Co.,* 172 F. 124, the Circuit Court of Appeals, 7th Circuit, said that *clear language* must appear for such a result. The Circuit Court of Appeals, 6th Circuit, in *Buckeye Cotton Oil Co.* v. *Louisville & N. R. Co.,* 24 F. (2d) 347 said such a result must have been *clearly intended.* In *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen,* 74 F. (2d) 983, the Circuit Court of Appeals, 5th Circuit, said such a result required *unequivocal terms.* The construction

[fol. 135] presently placed upon this type of contract by this court is contrary to *this* Circuit's previous decision in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199.

In the last cited case, a libel was filed for damages for breach of charter in that respondent, City of New York, had returned scows in damaged condition. The City of New York impleaded the Manhattan Ash Removal Corporation which was employed under contract with the City to unload the scows.

The contract contained the following indemnity provision:

> "After scows, either city owned or chartered from private parties, have been delivered to the contractor for unloading, he shall assume full responsibility and be liable for all damages caused to them either at or by the unloading machines or by the negligent acts or ommissions of the contractor, his servants, agents or employees, until returned to the department; the contractor shall reimburse the city for all damages which shall be caused to its vessels or those chartered by it, and shall save the city harmless from all claims for damages which may be made against it by the owners of chartered scows, caused while in the contractor's care and custody either by his unloading machinery or by the negligent acts or omissions of the contractor, his agents, servants or employees; such liability shall continue until such scows are returned to the department;" (Record on Appeal in cited case, p. 14 thereof).

The decree in the District Court went against Manhattan Ash Removal Corporation solely and it appealed. In modifying and holding the city for half-damages, Circuit Judge Hand said (p. 201 of 16 F. 2d):

> [fol. 136] "There remains only the question of the appellant's agreement with the city to hold it harmless for its 'negligent acts and omissions'. *This seems to us only to cover cases in which the City's liability to the scow owners arose without fault on its part.* It is quite true that the loss was here caused by the appellant's acts of discharging the scows without having proper fire protection, but it was also as much caused by the city's tender of the scows and insistence that the work should proceed. It would be a harsh and

unreasonable construction of the words to extend them to such a case, in which the city could not even enforce contribution at common law. *Union Stock Yards* v. *Chicago etc. R. R. Co.*, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525." (Italics supplied.)

If it had been the intention of the parties to this contract that American Stevedores Inc. indemnify the United States for the latter's negligence, solely or concurrently with that of American Stevedores, Inc., the contract would have recited that indemnity was to be had by the United States for damages "for which either or both of the parties hereto may or shall be liable", as was in issue in *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, 404, aff'd (C. C. A. 2—1938) 100 F. 2d 1016. *A priori*, it never was the intention of the parties that such a result obtain herein.

In *Weldon* v. *United States*, 65 F. (2d) 748, the shipowner sought to implead the stevedore *under a similar contract including a similar indemnity clause, as in the instant case* (p. 749 of 65 F. 2d—middle of right hand column). In the cited case, the indemnity clause (middle of right hand column, p. 749) provided that the stevedore agrees:

[fol. 137] "Also indemnifying the Owner against any damage or injury to cargo, while handling or stowing the same, and to any ship, including its equipment or apparel, wharves, docks, lighters, elevators, cars and car floats used in connection therewith, through negligence or fault of the Stevedore."

The contract in the instant case is to be found at page 22a of Appendix to brief of United States of America and the similarity is striking. In construing this contract in the cited case, the Circuit Court of Appeals, 1st Circuit, said (p. 749 of 65 F. 2d):

"It would be extraordinary to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. • • • The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work.

If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so." (Italics supplied.)

If, as gleaned from the opinion of this Court, the contract of indemnity is ambiguous, such ambiguity should be construed against the author of the contract, the United States. If this court is of the opinion as was the Circuit Court of Appeals, 1st Circuit, in *Smith, Kirkpatrick & Co.* v. *Columbian S. S. Co.*, 88 F. (2d) 392, 394, that "Admiralty contracts are usually ambiguous in some respects and in construing them the courts must endeavor to determine the true intention of the parties", it is respectfully urged that [fol. 138] this court exercise its discretion to permit further proof to be taken as to the intent of the parties to this contract. *The Silver Palm*, 94 F. (2d) 754; *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F. (2d) 992.

The record is barren of any evidence as to the intention of the parties to the indemnity provision in the contract. No finding relative to the same was made by the District Court (pp. 95a and 96a of Appendix to Brief of The United States of America), nor was any reference made thereto in the opinion of the Trial Court (pp. 92a-96a of Appendix to Brief of The United States of America). Indeed none of the parties supposed the question, now decided by this Court, to be crucial. We, therefore, respectfully urge this Court to follow the procedure set forth in its Per Curiam opinion of July 13, 1945, on the petition for rehearing, in *Waldie* v. *Steers Sand & Gravel Corporation*, wherein it said (151 F. [2d] 132):

> "The judge made no finding as to the consignee's negligence, and the question was probably not tried out as fully as it would have been, *had it then been supposed to be crucial.* Now that our reversal of the decree against the tug has made it so, *it seems to us equitable not to dismiss the libel as against the charterer on this record; but to remand the cause for further trial, though between these two parties only.*" (Italics supplied.)

In connection therewith, American Steyedores, Inc., will move this court on February 4, 1946 for leave to take such further testimony relative to the intent of the parties to the contract.

C

There is indeed strong doubt, if not authority to the contrary, that admiralty has no jurisdiction over the contract of indemnity. It was left open in *Shamrock Towing Co.* v. [fol. 139] *City of New York* (facts set forth on pp. 6, 7 hereof), 16 F. (2d) 199, 201, wherein Circuit Judge Hand said:

> "Thus we need not consider whether in any case admiralty could take cognizance of the contract, even to the extent of using it to determine where between the two the loss should fall."

However, in *The Wonder*, 79 F. (d) 312, Circuit Judge Augustus N. Hand writing for this Circuit said (pp. 313, 314 of 79 F. 2d):

> "The original contract between the city and E. O. Roberts Company, Inc. provided that the contractor 'should be responsible for all injuries to persons or damage to property either directly or indirectly that may result from his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

Even performing judicial surgery upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A Vapeur* v. *Bonnasse*, 19 F. (2d) 777, the provisions of indemnity, here involved, comprise that part of the contract which is non-maritime.

As aforestated, the petitioner, American Stevedores, Inc., is applying to this Court upon motion returnable February 4, 1946, for leave of this Court to permit all parties to this proceeding to take proof as to the intention of the parties relative to the indemnity clause.

It may be that this Court may desire to withhold its determination on this application for a rehearing, pending

[fol. 140] the determination of that motion and, in the event that the motion is granted, await the coming in of such proof, so that this application for rehearing can be considered simultaneously with, and in the light of, such further proof.

The effect of this Court's decision, as it now stands, is widespread. It affects every stevedoring contractor working under contracts similar to the one in question, and we believe that this Court can take judicial notice of the fact that during the period of World War II, and up to the present time, almost all stevedoring in this and other ports was being performed under similar Governmental contracts.

Wherefore, it is respectfully submitted that this Court grant a rehearing respecting the intent of the parties to the indemnity clause in the contract and the right of contribution as between the two parties thereto, found herein to have been concurrently negligent for causing the injuries to the libellant.

Respectfully submitted, Alexander & Ash, Proctors for Respondent-Impleaded-Appellant.

Edward Ash, Sidney A. Schwartz, Advocates.

Dated, New York, January 23, 1946.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

Edward Ash.

[fol. 141] Sirs:

Please take notice that a petition for rehearing, of which the foregoing is a copy, was this day filed in the office of the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.

Dated, New York, January 23, 1946.

Yours, etc., Alexander & Ash, Proctors for American Stevedores, Inc., Respondent-Impleaded-Appellant, 76 Beaver Street, New York City.

To: John F. X. McGohey, Esq., Proctor for United States of America, 45 Broadway, New York City. Jacob Rassner, Esq., Proctor for Libellant-Appellee, 220 Broadway, New York City.

[fol. 142] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

(Petition for Rehearing Submitted January 23, 1946. Decided January 31, 1946)

Docket No. 19904

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Before L. Hand, Swan and Frank, Circuit Judges

On Petition by American Stevedores, Inc., for Rehearing

Alexander & Ash, Proctors for petitioner.

[fol. 143] PER CURIAM:

This petition for rehearing is limited to so much of our decision as grants full, rather than one-half, indemnity to the United States against the impleaded respondent, American Stevedores, Inc. The petitioner argues that our opinion is erroneous in applying common law principles of contribution to a suit in admiralty in which we have affirmed findings that the libellant's injury resulted from the concurrent negligence of both the respondent and the impleaded respondent. We are by no means convinced that the rule of *The Chattahoochee*, 173 U. S. 540, which was not previously called to our attention, is controlling in a situation such as this, but the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under the respondent's contract.

The petitioner asserts that our interpretation of the indemnity contract is contrary to the authorities in this and other circuits. We do not so read them. *Shamrock Towing Co.* v. *City of New York*, 16 F. 2d 199, is the case cited

from our own circuit. There a libel was filed against the city for breach of charter in failing to return the chartered scows in good condition. The city impleaded a corporation which was employed under contract to unload the scows. The chartered scows were damaged by fire and both the city and the contractor were held liable to the libellant for negligent failure to supply fire protection at the dumping ground. A further question was whether the contractor was bound to stand the whole loss because of its agreement to hold the city harmless for damages caused to the scows "by the negligent acts or omissions of the contractor." We held the contract to cover only "cases in which the city's liability to the scow owners arose without fault [fol. 144] on its own part." Since the city might be liable to the scow owner under its charter without fault on its part, it was possible to limit the indemnity provisions as we did without depriving them of all utility. In the case at bar, however, the United States could be liable only if itself at fault; hence a similar construction here would make the indemnity provision meaningless. Without analyzing the authorities from other circuits cited by the petitioner it will suffice to say that none of them, in our opinion, is contrary to the decision we have reached. Nor need we be troubled by doubt as to admiralty jurisdiction extending to a contract of indemnity, since jurisdiction could rest on the fact that the indemnitee is the *United States*, 28 USCA § 41(1); see *Tuthill* v. *United States*, 38 F. 538 (N. D. Ill.), app. dis., 136 U. S. 652.

Petition for rehearing denied.

[fol. 145] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant,

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

A petition for a rehearing having been filed herein by counsel for the American Stevedores, Inc.,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 146] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello, v. United States of America and Another. Order. United States Circuit Court of Appeals: Second Circuit. Filed Jan. 31, 1946. Alexander M. Bell, Clerk.

[fol. 147] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

SIRS:

Please Take Notice that upon the record on appeal in the above entitled proceeding, the petition for limited rehearing filed herein on January 23, 1946, by the undersigned, and the annexed affidavits of Gus Blair Chiarello, Frank W. Nolan, and Edward Ash, the undersigned will move this Court at a stated term for motions to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on February 4, 1946, at 10:30 A. M., on said day, or as soon thereafter as counsel can be heard, for the entry of an order or orders (1) permitting any party hereto to take proof to be submitted to this Court as to the intent of the parties respecting the indemnity clause in the agreement of July 17, 1942, or (2) remanding this proceeding to the District Court for further hearing herein as to the intent and meaning of the indemnity clause in said agreement and (3) staying the issuance of the mandate herein pending further order of this Court, (4) and for such other and further relief [fol. 148] in the premises as the Court may deem just and proper.

Dated: New York, January 23, 1946.

Alexander & Ash, Proctors for American Stevedores, Inc., 76 Beaver Street, New York City.

To: John F. X. McGohey, Esq., Proctor for United States of America, Southern District of New York, 45 Broadway, New York City. Jacob Rassner, Esq., Proctor for Libellant-Appellee, 220 Broadway, New York City.

[fol. 149] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Gus Blair Chiarello, being duly sworn, deposes and says:

I am Vice-President and Operating Manager of American Stevedores, Inc., respondent-impleaded in the above-entitled proceeding.

I was one of the members of the contracting stevedore's committee which took up with representatives of the United States the proposed stevedoring contract, which resulted in the final form of the contract signed by the American Stevedores, Inc., with the Government on July 17, 1942. That is the contract involved in this action and pursuant to which the American Stevedores, Inc., was loading Army cargo aboard the USS "Thomas Stone" on September 23, 1942, when the libellant, Porello, was injured.

[fol. 150] During the time of the discussion of the form of the stevedoring contract, and the terms that were to be embraced in it, there was no suggestion, intimation or contention made either by the representatives of the Government themselves or the stevedoring contractors present that the indemnity clause which is paragraph 12 of the contract, was intended to provide that the stevedoring contractor was to indemnify the United States for any claim or damage due to the negligence of the United States or any defect in the appliances, machinery, etc., of its vessels. Certainly such was not the intent of the American Stevedores, Inc., when it executed the agreement dated July 17, 1942. The intent of the indemnity clause of the agreement, as I understand it, and as I believe the representatives of the United States and the other stevedoring contractors

understood it, was that the stevedoring contractor was to indemnify the United States only for the negligence of the contracting stevedore.

The agreement of July 17, 1942, was drawn and prepared by the United States and delivered to American Stevedores, Inc., in final form for signature, whereupon it was signed, executed and returned to the Government for execution by it.

I have read the opinion of this Honorable Court, dated January 10, 1945 and am generally familiar with the factual situation in this action. It was not contemplated or intended at the time that the American Stevedores, Inc., entered into the agreement dated July 17, 1942, that it would be called upon to indemnify the United States under a factual situation such as is present in this action. I do not believe that the representatives of the United States with whom the contract was discussed contemplated or intended that a stevedoring contractor, such as the American Stevedores, Inc., would be called upon, or obligated to, the Government for the Government's own negligence or any defect in the vessel's appliances such as was present in this case.

[fol. 151] The interpretation given by this Honorable Court to the indemnity clause of the agreement is most important and has alarming effect, because the indemnity clause was universally used, I believe, in almost all stevedoring contracts. The interpretation placed upon that clause by this Honorable Court places upon stevedores generally, and upon the American Stevedores, Inc., in the instant case, a risk and obligation which it was not intended they should assume. It calls upon them to answer for the negligence of the United States and defects in its steamers' equipment which they did not contemplate at the time the contract was entered into. It was not within the contemplation of the contracting stevedores, or my company, that if both the United States or the ship whereon stevedoring work was being done, were both negligent that the stevedoring contractor should indemnify the United States for the total amount of any liability.

It is respectfully requested, by deponent in behalf of the American Stevedores, Inc., that permission be granted by this Court to take testimony upon the subject of this affidavit to the end that the true and intended purpose of

the indemnity clause can be presented to it for its further consideration.

Gus Blair Chiarello (Sgd.)

Sworn to before me, this 18 day of January, 1946.
Walter Gans, Notary —, Queens Co. (Seal.)

[fol. 152] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Frank W. Nolan, being duly sworn, deposes and says:

I reside at 305 Hartford Road, South Orange, N. J., and am now, and was for sometime prior to 1942, the Chairman of the Stevedoring Committee of The Maritime Association of the Port of New York.

I am also the President of The Jarka Corporation which has been for many years past engaged in stevedoring operations in the Port of New York.

I, as Chairman of the aforesaid Committee, was active in the conferences with the representatives of the United States Army Transport Corps, which resulted in the form of contract to be used by the Government and stevedores in connection with the loading and unloading of Govern- [fol. 153] ment operated vessels in this Port. One of the clauses of the Agreement, known as the "Indemnity Clause" in its final form reads as follows:

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise

handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and carfloats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

It is my recollection that when the quoted clause was discussed that there was no contention made by the Government representatives that it was the intent of such clause that a Stevedore performing work for the Government under the contract was to indemnify, or be liable to the Government for any negligence on the part of the Government or the defective equipment of its ships. It was intended by the above quoted clause that a Stevedoring contractor was to be liable to and indemnify the Government solely for the Stevedore's own negligence. It was never the intention that the Stevedore was to indemnify or be liable to the Government for the negligence of the Government in the event that the Stevedore and the Government, or its ships, were jointly liable for injuries to any party. It was the intent of the quoted clause that the Stevedore was to remain liable for and only indemnify the Government for the Stevedore's own negligence.

I have read the opinion of this Court dated January 10, 1946, in the above entitled action, and after the reading [fol. 154] thereof it is my opinion based upon the negotiations had with the Government representatives prior to the agreement as to the form of contract in effect in July, 1942, that it was not intended that the Stevedore was to indemnify the Government under the facts set forth in the opinion.

The opinion referred to is of particular importance not only to the Jarka Corporation of which I ame the President, but, in my opinion, to all those engaged in Stevedoring operations, as all Stevedores working under U. S. Army Transport contracts had substantially the same indemnity clause.

If the liability imposed upon Stevedores as set forth in the opinion referred to is to remain unchanged, it will, in my opinion impose upon them an obligation not contemplated by them or the Government at the time they entered into the

Army Agreements which incorporate the indemnity clause above quoted.

Frank W. Nolan.

Sworn to before me, this 17th day of January, 1946. Thos. F. Bergin, Notary Public, Suffolk County. Cert. filed in N. Y. Co., No. 1052. Commission Expires March 30, 1946. (Seal.)

[fol. 155] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Edward Ash, being duly sworn, deposes and says:

I have been in charge of all prior proceedings in behalf of the American Stevedores, Inc., in the above entitled Admiralty proceeding. In its behalf, I tried the case in the District Court and argued the appeal in this Court.

The instant application is made in the light of this Court's construction and determination of the effect of the indemnity agreement, referred to on page 616 of its opinion. Therein this Court said

> "It is reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and shipowner are at fault." See United States v. Wallace, 18 F. 2d 20, 21 (C. C. A. 9).
>
> . . . . . .
>
> [fol. 156] "Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone

bear the loss, and the quoted provision was inserted in the contract for that purpose."

No testimony or other proof respecting the intent of the parties to such agreement was offered in the District Court nor was any finding of fact nor conclusion of law made with respect thereto. The intent of the indemnity clause in the agreement was not discussed by the District Court in its opinion.

The indemnity clause was not deemed ambiguous until given the construction by this Honorable Court in its opinion. Had there been any indication of ambiguity or that the intent of the indemnity clause was that stated by this Court, then upon the trial of this case in the District Court, proof as to the intent of the United States and the American Stevedores, Inc., would have been given with respect thereto. Such proof would have consisted in substance of that set forth in the affidavits annexed hereto. No proof as to this subject was offered by any party to the proceeding.

The determination of this Court as to the intent and meaning of the indemnity clause transcends and is far wider in scope than solely to affect the interests of the parties to the instant proceeding. Such indemnity clause, deponent is informed, and as is set forth in the annexed affidavits, is of almost universal use in stevedoring contracts covering operations in this and other ports.

Deponent believes that it would be in furtherance of the ends of justice in this matter, and in keeping with the [fol. 157] desire of this Court to ascertain the facts in any matter before it, to permit the parties hereto to adduce evidence before this Court, or before the District Court, as to the intention of the parties to the agreement insofar as the meaning of the indemnity clause is concerned. To permit the production and submission of such evidence, even at this time, would not prejudice any of the parties to this proceeding but would enable a final adjudication on this point to be made by the Court in the light of, and based upon, a complete statement of the facts and the actual intention of the parties.

Accordingly, deponent as proctor of the American Stevedores, Inc., asks that this Court, in the exercise of its discretion, permit any of the parties to this proceeding to take proof as to the intent of the parties respecting the

said indemnity agreement and the interpretation of those who negotiated such agreement prior to its execution, either before a commissioner to be appointed by this Court, or before a notary public, or by remanding this proceeding for further proceedings and hearing to the District Court upon such limited question. The latter indicated course would permit a hearing in open Court before a District Judge and its making of a finding of fact and conclusion of law with respect thereto which could then, if any party desired, be reviewed by this Court.

Edward Ash.

Sworn to before me, this 22nd day of January, 1946. Harriet R. Brook, Notary Public, Kings County. Kings Co. Clk's No. 866. Reg. No. 738-B-7. N. Y. Co. Clk's No. 1653. Reg. No. 1258-B-7. Commission Expires March 30, 1947. (Seal.)

[fol. 158] [Endorsed:] No. 96—October 1945 Term. United States Circuit Court of Appeals for the Second Circuit. Rosario Porello, Libellant-Appellant, against United States of America, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant. Notice of Motion. Motion Denied. L. H., T. W. S., J. N. F. Feb. 18, 1946. C. JJ.

[fol. 159] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of February, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

ROSARIO PORELLO, Libellant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellant, AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

A motion having been made herein by counsel for Respondent-Impleaded-Appellant to permit any party hereto to take proof to be submitted to this court as to the

intent of the parties respecting the indemnity clause in the agreement of July 17, 1942, or for other and further relief and to stay issuance of the mandate,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 160] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello, v. United States & Ano. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 19, 1946. Alexander M. Bell, Clerk.

[fol. 161] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered Part I, 1a to 103a; Part II, 1 to 13; Part III, I to XLII inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Rosario Porello, Libellant-Appellant, against United States of America, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of February, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk.

[fol. 147] SUPREME COURT OF THE UNITED STATES

[Title omitted.]

ORDER ALLOWING CERTIORARI—Filed May 6, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 148] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted.]

STIPULATION AS TO RECORD—Filed June 5, 1946

It Is Hereby Stipulated and Agreed by and between the proctors for the respective parties hereto, that the record in the Supreme Court of the United States on writ of certiorari, heretofore granted, shall consist solely of the appendix to the brief of the United States of America in the Circuit Court of Appeals, the appendix to the brief of American Stevedores, Inc. in the Circuit Court of Appeals, and the proceedings had in the Circuit Court of Appeals.

Dated, New York, May 10, 1946.

Jacob Rassner, Proctor for Rosario Porello, Respondent; J. Howard McGrath, Solicitor General, Proctor for United States of America, Respondent; Edward Ash, Proctor for American Stevedores, Inc., Petitioner, 76 Beaver, N. Y. C.

FILE COPY

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MAR 25 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 993 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO

and

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO

and

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Stevedores, Inc., respectfully prays for a writ of certiorari to review a final order of the United States Circuit Court of Appeals for the Second Circuit, which modified the decree of the United States District Court for the Southern District of New York in favor of the libellant by (1) directing that the United States recover full indemnity from the petitioner and (2) by increasing the damages found by the District Court, and as so modified affirmed the decree.

Petitioner herein seeks a review by this Court of only so much of the determination of the Circuit Court of Appeals which held that there was jurisdiction of an action for personal injuries under the Public Vessels Act, which granted full indemnity from the petitioner to the United States and which held that, under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. Secs. 901, *et seq.*), the libellant was not precluded from instituting the present action.

Statement of the Case

On September 23, 1942, the petitioner under a stevedoring contract with the United States (R. 22a), known as a "Warshipsteve" contract, was loading the Navy Transport "Thomas Stone", owned by the United States (R. 21a). Said transport was loaded with various supplies, military vehicles, and troops (R. 33a, 61a, 68a) and an army officer had been assigned to the vessel as troop transport quartermaster (R. 62a). One of petitioner's employees, Rosario Porello, while stowing cargo in the No. 1 hold of said vessel, was injured when a strongback or thwartship beam, together with several hatch covers, was caused to fall into the hold (R. 120).

The plans of this vessel called for a locking device to hold this strongback in place, but none was installed by the United States and, as the Circuit Court of Appeals found, no explanation for its absence was proffered by the United States (R. 121).

A military vehicle had been lowered into the hold of the vessel and had been landed upon the tank top preparatory to its being moved into a wing of the vessel's No. 1 hatch (R. 121). In order to move this vehicle, Di Mare, foreman of the hatch gang and an employee of the Petitioner, ordered the vehicle raised (R. 69a). After a repeat order, the vehicle was raised and in so doing it

came in contact with this strongback and unseated it, precipitating it and several hatch covers into the hold striking Porello (R. 70a, 71a, 121).

Porello brought an action on March 29, 1943, *in admiralty,* against the United States in the United States District Court for the Southern District of New York under the Public Vessels Act, 46 U. S. C. A. 781 (R. 112). The United States impleaded the petitioner under General Admiralty Rule 56 (R. 21a), alleging that, if any negligence be established, it was solely American Stevedores, Inc., who was negligent and that it had agreed under its "Warshipsteve" contract to "be responsible for injury to persons through the negligence or fault of the Stevedore, his employees and servants" (R. 22a).

Between the date of the accident, September 23, 1942, and July 30, 1943 (10 months), Porello received compensation benefits and medical attention aggregating $1,421.77 (R. 95a, 112). These payments were not made under an award but they were retained by Porello (R. 113, 95a). In fact, as appears from the foregoing, Porello accepted and retained compensation for two months after the institution of his suit against the shipowner (R. 108).

The Trial Court found, upon the evidence adduced, that the United States had been negligent in that the beam or strongback contained only one locking device and was therefore defective (R. 95a) and that the petitioner herein, having knowledge of that, had been negligent in the manner in which the cargo had been handled (R. 96a). For the concurrent negligence, as so found, the Trial Court decreed that the libellant fully recover against the United States, and that the United States of America have *contribution* from the petitioner herein for one-half so paid (R. 97a). A credit for the compensation benefits of $1,421.77 was allowed the petitioner

herein (R. 95a). The United States of America and the petitioner herein appealed from such final decree (R. 98a) and the libellant filed assignments of error respecting the inadequacy of the award of damages.

The Circuit Court of Appeals, in agreeing with the Trial Court, held the absence of the lock and Di Mare's negligent handling of the cargo operated concurrently in producing the resultant injury and that the petitioner and the United States of America were joint tort-feasors (R. 121, 122). However, the Circuit Court of Appeals held that contribution did not exist *in admiralty* in that there was not a common liability (R. 122). The Circuit Court of Appeals held there was jurisdiction under the Public Vessels Act (R. 120), increased the award to the libellant (R. 125), held that his capacity to sue had not been impaired by the acceptance and retention of compensation (R. 123), and that the United States of America was entitled to full indemnity under its "Warshipsteve" contract (R. 123). After the decision of the Circuit Court of Appeals, a Petition for Limited Rehearing was filed by the petitioner herein (R. 126) and the same was denied on January 31, 1946 (R. 137) with a *Per Curiam* opinion (R. 135). A motion to take additional testimony as to the intent of the parties to the indemnity provision in the "Warshipsteve" contract was thereafter filed (R. 138) and denied on February 19, 1946 (R. 146). This application for a writ of certiorari then followed.

Jurisdiction

The jurisdiction of this Court to entertain this Petition and to grant the same is provided by Section 347 (a) of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5(b).

Questions Presented

1. Has the United States consented to be sued under The Public Vessels Act of 1925 for personal injury or death claims?

2. Is the United States, under its "Warshipsteve" agreement, used throughout the country, entitled to full indemnity from a contracting stevedore where the negligence of each concurred in causing injuries to the stevedore's employee?

3. Is there contribution in admiralty between a shipowner and a contracting stevedore since the enactment of the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, *et seq.*?

4. Does contribution in admiralty depend upon a common liability or upon a common remedy?

5. Does an injured longshoreman, by the acceptance and retention of compensation benefits without an award, preclude himself from bringing any action against a third party under 33 U. S. C. A. § 933 (a)?

6. Are subdivisions (a) and (b) of § 933 of 33 U. S. C. A. to be read as an integrated whole?

7. Does admiralty have jurisdiction of an indemnity provision in a stevedoring contract?

Opinions Below

The opinion of December 4, 1944 of the United States District Court for the Southern District of New York is not officially reported but appears at pages 92a-97a inclusive of the record. The opinion of January 10, 1946

of the Circuit Court of Appeals, 2nd Circuit, is not officially reported as yet but the same appears at pages 119-125 inclusive of the record. The *Per Curiam* opinion of the Circuit Court of Appeals of January 31, 1946, denying rehearing, appears at pages 135-136 of the record.

Reasons Relied Upon for Allowance of the Writ

1. The decision of the Circuit Court of Appeals respecting the jurisdiction of the Court over a personal injury claim under the Public Vessels Act of 1925 (46 U. S. C. A. 781) placed reliance upon this Court's decision in *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215. The question here presented was not involved in the *Canadian Aviator* case. The question of a court's jurisdiction of a personal injury claim under the Public Vessels Act presents for the first time to this Court the construction of the word "damages", as used in the statute. In connection therewith the legislative history of the enactment shows that the word *damages* only contemplated *property* damage. Settlement of the judicial construction of this federal statute should come from this Court.

2. The decision of the Circuit Court of Appeals as to the interpretation of the "Warshipsteve" contract is in conflict with the decisions on the same question by the Circuit Court of Appeals for the First and Ninth Circuits.

Weldon v. *United States,* 65 F. (2d) 748 (C. C. A. 1);
United States v. *Wallace,* 18 F. (2d) 20 (C. C. A. 9).

The decision of the Circuit Court is clearly contrary to the language and rationale of various Circuit Courts in many cases, involving similar contracts, and with a prior decision of the Second Circuit as well as some state court decisions.

Shamrock Towing Co. v. *City of New York,* 16 F. (2d) 199 (C. C. A. 2);
North American Ry. Const. Co. v. *Cincinnati Traction Co.,* 172 F. 214 (C. C. A. 7);
Southern Bell Tel. & Tel. Co. v. *Mayor and Bd. of Alderman,* 74 F. (2d) 983 (C. C. A. 5);
Thompson-Starrett Co. v. *Otis Elevator Co.,* 271 N. Y. 36.

3. The decision of the Circuit Court of Appeals, as to the right of contribution in admiralty between shipowner and contracting stevedore, although left open in the *Per Curiam* opinion denying rehearing, involves an important question of Maritime Law, which has not been but should be settled by this Court. The rationale of the decision in the instant case is diametrically opposed to that enunciated 3 months prior thereto by the same Circuit Court in *Barbarino* v. *Stanhope S. S. Co.,* 151 F. (2d) 553.

4. The Circuit Court of Appeals has virtually lifted by its bootstraps a concept of contribution between joint tort feasors from another field of jurisprudence and has infused that principle into admiralty. In so doing, it has violated a fundamental precept of admiralty that "the right to contribution belongs to the substantive law of admiralty". Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.,* 218 U. S. 264, 31 S. Ct. 17. In reaching its conclusion, the Circuit Court, having nonetheless found that the petitioner and shipowner were joint tort feasors, overthrew the well established juristic philosophy in admiralty that the right to contribution is a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

5. The decision of the Circuit Court of Appeals as to the right of a longshoreman, having accepted and retained compensation without an award, to maintain an action

against a third party under 33 U. S. C. A. § 933(a) is an important question of federal law which has never been before this Court but should be settled by this court. This question has been before the District Courts on many occasions and the opinions of those courts are in conflict. The Circuit Court of Appeals has been presented with the question of *election of remedies* under § 933 (a) of Title 33 of the United States Code for the first time in the instant matter, and in resolving that question the Circuit Court has relied upon a lower court decision which stands opposed to the result reached by the Circuit Court of Appeals. In arriving at this result the Circuit Court has disregarded the intent of Congress and has engaged in "judicial legislation".

6. In holding that admiralty has jurisdiction of an indemnity provision in a stevedoring contract, the Circuit Court relied upon 28 U. S. C. A. § 41 (1) since the United States was the indemnitee. It therefore has applied to an admiralty action the character of the litigant as a test of jurisdiction, which is the test at common law or equity, by the very wording of the jurisdictional statute. In so holding it has disregarded the principle in admiralty that the subject matter of the contract must be maritime in nature in order that jurisdiction obtain. The decision, as rendered by the Circuit Court, stands opposed to the rationale of admiralty jurisdiction over contracts of indemnity, as enunciated by the same court in *The Wonder,* 79 F. (2d) 312. The decision of the Circuit Court stands opposed to the decision and views of this Court in *Armour & Co. v. Fort Morgan S. S. Co.,* 270 U. S. 253.

The interpretation of this "Warshipsteve" contract, used throughout the country, by the Circuit Court of Appeals is one which should be examined by this Court, and a determination made whether the various cases

hitherto decided are incorrect or whether the present decision is erroneous. If the interpretation is correct, then clarification should emanate from this Court so that the application of this decision by the many District Courts will not result in greater uncertainty. The scope and limits of its application should be enunciated by this Court so that uniformity of decision may be had in maritime causes of action. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. By this decision, every contracting stevedore becomes the insurer, without a premium or benefit, of the negligence of the United States, as shipowner, or of any private shipowner, where similar or identical contracts are used. Further, where contracting stevedores formerly had coverage under their policies with casualty companies, they now stand uninsured by reason of the casualty companies' contentions that they do not cover liabilities contractually assumed by the contracting stevedores.

The instant case is intrinsically of public importance and is peculiarly appropriate for hearing by this Court as it is the first case in which this Court has been asked to decide the various questions presented. The various shipping interests, be they the injured longshoreman, the shipowners, the contracting stevedores or the underwriters of the liability of said stevedores under the *U. S. Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. §§ 901, *et seq.*, await the enunciation of the law by this Court.

We have recently emerged from a war during which all public vessels were owned by the United States and nearly all our merchant vessels were owned or operated by the United States Government, through the Administrator of the War Shipping Administration. Multitudinous personal injury actions are still pending against the United States by virtue of these operations. Many actions will hereafter be instituted against private ship-

owners wherein contracting stevedores will be impleaded. Shipping interests at large look to this Court for a delineation of their respective rights (R. 142). Wherefore, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

AMERICAN STEVEDORES, INC.,
Petitioner.

By EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

UNDER THE PUBLIC VESSELS ACT OF 1925, THE UNITED STATES HAS NOT CONSENTED TO BE SUED FOR PERSONAL INJURIES OR DEATH, AND THIS CONCLUSION IS BORNE OUT BY THE LEGISLATIVE HISTORY OF THE ENACTMENT.

In 1919 there were introduced in Congress two bills, known as S. 3076 and H. R. 7124. These bills were referred to the Committee on Judiciary. While they were in Committee, the Attorney General proposed a substitute bill. On November 13, 1919, there was a full hearing with respect to the latter bill. Passage of the bill of 1919 was urged by steamship operators and owners and not in any respect by persons interested in personal injury claims. (See Report 1301 of the House of Representatives, 66th Congress, 3rd Session, February 7, 1921). At page 43 of the report of the hearing the colloquy between Colonel Lee and Mr. Husted shows that *only* shipowners were being considered in the proposed bill. That the foregoing is true appears further from Mr. Igoe's statement at page 44 of said report. (Hearing of the House Committee on Judiciary, S. 3076 and H. R. 7124, November 13, 1919, 66th Congress, 1st Session). Apparently these bills did not get out of Committee.

On February 2, 1921, Mr. Husted introduced in the House a bill known as H. R. 15977, 60 *Cong. Rec.* 2478. The bill was referred to the Committee on Judiciary. The Committee reported on February 7, 1921 that this bill pass with certain amendments. 60 *Cong. Rec.* 2760. In its report (Report No. 1301, 66th Congress, 3rd Session, Feb. 7, 1921) the proponents of the legislation were steamship owners and operators. The bill's chief purpose, according to the Committee, was to grant "*private owners of vessels and of merchandise a right of action when their vessels or*

*goods have been damaged as the result of collision with Government-owned vessel * * *"*. No suggestion in the Report is to be found that the purpose of the bill embraces personal injury claims. Mr. Husted's bills H. R. 15977 and H. R. 6256, introduced in May 16, 1921, (61 *Cong. Rec.* 1492) were not passed. Instead, Congress on December 28, 1922 passed 2 statutes, which in application covered property damage up to a certain maximum amount (Report No. 913, House, 68th Congress, 1st Session, May 31, 1924). Thus, it will be seen that the Public Vessels Act, as originally conceived, embraced solely *property damage caused by collision.*

On February 14, 1924 Mr. Underhill introduced H. R. 6989 (65 *Cong. Rec.* 2474). This bill was referred to the Committee on Claims. 65 *Cong. Rec.* 2474. Mr. Edmonds, chairman of the Committee on Claims, on May 31, 1924 brought in H. Rep. No. 913, May 31, 1924, 68th Cong. 1st Sess.; 65 Cong. Rec. 10069. The report contained copies of correspondence between Mr. Edmonds and various cabinet members who recommended passage of H. R. 6989, which contained the phrase "damages caused by *collision* by a Public Vessel." Two days before submission of this report, Mr. Underhill introduced, as a substitute for bill H. R. 6989, bill H. R. 9535 which contained the phrase "for damages *caused* by a public vessel". The purpose of this substitute bill appears at pages 1 and 2 of Report No. 913, *supra.*

This substitute bill, H. R. 9535 became the Public Vessels Act on March 3, 1925. 66 *Cong. Rec.* 5530. The only change in H. R. 6989 and H. R. 9535 was the insertion of "damages *caused* by a public vessel" in place of "damages *caused by collision* by a public vessel".

Therefor, the question posed in the instant case is:

> Did Congress change the meaning of the word "damages" to embrace personal injury damages, by its elimination of the words "by collision", from the Public Vessels Act?

We think this must be answered in the negative. The petitioner contends that collision was eliminated as the sole cause for damage but that the nature or quality of damages was still confined to *property* damage, in contradistinction to personal injury damages. The same is gleaned from the Committee's Report No. 913, *supra*. At pages 14, 15 of said report the statement of Secretary Weeks shows that the *amount* of the *property* claims was thereby extended in admiralty, in distinction to the settlement of small claims under the two statutes of December 28, 1922, *supra*. From the various Reports, *supra*, it will be seen that H. R. 15977 introduced in 1921, H. R. 6989, introduced in 1924, and its substitute H. R. 9535, which became the Public Vessels Act, were all shipowners' bills, and were designed for property damage solely. The sponsor of H. R. 9535 stated on the floor of the house (66 *Cong. Rec.* 2087):

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels *whose property has been damaged by collision or other fault* of Government vessels and Government agents." (Italics supplied.)

The colloquy between Mr. Upshaw, Mr. MacLafferty and Mr. Underhill, the sponsor of The Public Vessels Act, at pages 2087 and 2088 of 66 *Cong. Rec.*, shows quite clearly that there was evidenced concern for personal injury claims but that the same was not the subject of the Public Vessels Act but would be looked into by Mr. Underhill at some future time.

When bill H. R. 9535 was before the Senate, the attention of the Senators was called to S. Rep. No. 941, 68th Congress, 2nd Session, which was a copy of House Report No. 913, *supra*. Senator Bayard, in whose charge H. R. 9535 was placed, referred to the colloquy of Mr. Underhill, Upshaw and MacLafferty as to personal injury claims. 66 *Cong. Rec.* 4310.

H. R. 9075, which was an act to amend the Suits in Admiralty Act of 1920 to make the latter applicable to all public vessels, was pending before the Congress at the very time the Public Vessels Act was passed. Hearings on H. R. 9075 were had before the Judiciary Committee and thereat many prominent members of the admiralty bar appeared to urge its passage. Judge Hough's remarks that the United States should consent to make itself liable for personal injuries and death by the amendment of the Suits in Admiralty Act were made clear to the Committee. Notwithstanding, H. R. 9075 was discarded and H. R. 9535, sponsored by Mr. Underhill, who had stated to Congress that it related solely to property damage, was passed.

The history of unsuccessful attempts to pass legislation providing a remedy against the United States for personal injuries caused by public vessels is briefly as follows:

In 1926, H. R. 8651 was introduced in the House. 67 *Cong. Rec.* 3071. Section 8 (3) provided explicitly that property damage covered by the Public Vessels Act was excluded. No reference is made therein to personal injuries, from which it is therefore inferable that personal injuries were not covered by the Public Vessels Act. Senate bill S. 1912 was considered by the House in conjunction with H. R. 8651. It amended S. 1912 to conform to H. R. 8651. 67 *Cong. Rec.* 11086, 11099 to 11111. As so amended it was passed by the House. It was not repassed by the Senate.

On January 13, 1928, H. R. 9285 was introduced by Mr. Underhill. 69 *Cong. Rec.* 1468. It excluded by Section 4(3) property damage arising under the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925. Again, a recognition that the Public Vessels Act did not embrace personal injury claims. Bill H. R. 9285 was referred to the Committee on Claims. The debate in the House on January 30, 1928 shows Mr. Underhill restating

that the Public Vessels Act only embraced property damage. 69 *Cong. Rec.* 2184. This bill received a pocket veto by the President, although passed in both the Senate and the House. 70 *Cong. Rec.* 5217, 5220 and 5230.

Private bills have been passed to allow relief to personal injury claimants. As recently as 1937, Congress, by virtue of 2 private enactments, awarded damages to various persons injured by reason of the negligence of a public vessel. See, *An Act for the relief of Edna M. Callahan and Anna Scott,* 50 Statutes At Large, Part 2, page 927; *An Act for the relief of Margaret Grace and Alice Shriner,* 50 Statutes At Large, Part 2, page 992; House Report No. 33, 75th Congress, 1st Sess.; House Report No. 322, 75th Congress, 1st Sess. If the Public Vessels Act had provided a remedy for personal injuries, the Committee on Claims by virtue of Rule 15 of the Rules of the House Committee on Claims, would have been precluded from considering such claims. It therefor follows that by its own construction of its legislation Congress holds that the Public Vessels Act does not embrace personal injury cases.

The question whether the Public Vessels Act embraces personal injury *damages* has not been decided by any court. In *O'Neal* v. *United States,* 11 F. (2d) 869, aff'd 11 F. (2d) 871, Judge Campbell, although stating the purpose of the Act (p. 870), decided the case on the theory that an employee of the United States was not given any rights under this statute against the United States, his employer. This theory compelled the Circuit Court of Appeals, 2nd Circuit, to conclude that a naval officer could not recover for the unseaworthiness of a submarine in *Dobson* v. *United States,* 27 F. (2d) 807. The question raised in the instant case was left open in the cited case, as appears from the statement at page 808 of said case:

> "Appellee, on the other hand, argues that the statute should be construed as limiting recovery to dam-

> ages to property and not contemplating compensation for loss of life. We do not find it necessary to determine this question in the present case."

The question here raised was not before the Court in *Bradey* v. *United States*, 151 F. (2d) 742.

In *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215, this Court traced the legislative history of the statute here involved and settled the controversy as to whether the phrase "damages *caused* by a public vessel" meant "damages caused by *collision*" only. This Court there did not consider whether the term "damage" meant "property damage" solely or embraced personal injury damage. The following statement, appearing at page 218 of 324 U. S. shows that this Court had in mind that the Public Vessels Act was a bill for the relief of shipowners:

> "The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private *vessel-owners* an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States." (Italics supplied.)

Under the rule of law requiring strict construction of statutes waiving sovereign immunity (*United States* v. *Sherwood*, 312 U. S. 584; *Eastern Transportation Company* v. *United States*, 272 U. S. 675) and under the legislative history, *supra*, a court has no jurisdiction of a cause of action for personal injuries under the Public Vessels Act.

Assuming, arguendo, that there were jurisdiction under this Act, is the United States entitled to full indemnity from a contracting stevedore under its "Warshipsteve" contract where the negligence of the United States has concurred with that of the contracting stevedore to cause injury to the stevedore's employee?

A CONTRACTING STEVEDORE IS NOT AN INDEMNITOR OR INSURER OF A SHIPOWNER'S NEGLIGENCE, ABSENT UNEQUIVOCAL OR CLEAR LANGUAGE TO THAT EFFECT IN THE STEVEDORING CONTRACT.

The law on the subject of the responsibility of contracting stevedore to shipowner under a stevedoring contract has hitherto been enunciated by the Circuit Court of Appeals for the 9th Circuit in *United States* v. *Wallace*, 18 F. (2d) 20, and by the Circuit Court of Appeals for the 1st Circuit in *Weldon* v. *United States*, 65 F. (2d) 748. In concluding that the provision for indemnity in this "Warshipsteve" contract entitled the United States, shipowner, to full indemnity, the Circuit Court of Appeals reiterated the rationale of the *Wallace* case, *supra*, yet arrived at a diametrically opposed result. This, despite the rule of thumb in the *Wallace* case (18 F. (2d) 21):

> "As is pointed out in Perry v. Payne, supra, *we should not, in the absence of language free from all doubt,* conclude that the parties intended the contractor should assume an obligation which, for a single act of negligence on the part of the owner, or of one of its employés, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." (Italics supplied.)

The *result* of the *Wallace* case becomes indeed salient by virtue of the fact that the Court there was interpreting a United States Shipping Board contract, which incorporated an indemnity clause similar to the instant one, and in the cited case the United States, shipowner, was held solely at fault.

In *Weldon* v. *United States*, 65 F. (2d) 748, the Circuit Court of Appeals, 1st Circuit, was confronted with the construction and interpretation of a United States

Shipping Board Merchant Fleet Corporation contract, which contained a *similar indemnity clause* (p. 749 of 65 F. (2d) middle of right hand column—Compare indemnity clause in instant matter at p. 22a of Record). In construing this contract, the Court in the cited case said (65 F. (2d) at p. 749):

> "It would be *extraordinary* to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work. *If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so.*" (Italics supplied.)

Yet the very judicial result which would be extraordinary to the Circuit Court of Appeals, 1st Circuit, becomes the reasonable pattern of interpretation for the Circuit Court of Appeals, 2nd Circuit. This irreconcilable conflict becomes the warp and woof of this petition.

In refuting the argument of the petitioner that this "Warshipsteve" contract should be interpreted so that complete indemnity could only be had if the contracting stevedore were solely negligent, the Circuit Court said (R. 122):

> "The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured."

The same is palpably erroneous in that the person injured might very well not be the stevedore's employee in which event it certainly would be liable. Furthermore, if it were impleaded by the shipowner, as it was here, in a

suit instituted by the stevedore's employee, and there were a finding that it was the active or primary tort feasor, it certainly would be liable to the injured person, circuitously though if he be its employee. These considerations of active-passive negligence are not before this Court as the Circuit Court of Appeals has concurred with the District Court that the petitioner and the United States were joint tort feasors (R. 122). Bypassed completely is any discussion of active and passive negligence, primary and secondary liability, and indeed the finding that the parties hereto were joint tort feasors, which to our mind means wrongdoers *in pari delicto,* militates against any consideration of active and passive negligence.

Various Circuit Courts and other tribunals have characterized the terms or language of a contract which warrant the judicial interpretation that a contractor or indemnitor will indemnify another contractor for the latter's negligence.

To accomplish that result the Circuit Court of Appeals, 7th Circuit, in *North American Ry. Const. Co.* v. *Cincinnati Traction Co.*, 172 F. 214, said *clear* language must be utilized. The Circuit Court of Appeals, 5th Circuit, in *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen*, 74 F. (2d) 983, said such a result required *unequivocal* terms. The Circuit Court of Appeals, 4th Circuit, in *Washington & Berkeley Bridge Co.* v. *Pennsylvania Steel Co.*, 215 F. 32, 34, said:

> "The presumption is exceedingly strong against an undertaking by any one except an indemnity company to be responsible for the negligent acts of another."

In *United States* v. *Wallace et al., supra,* the Circuit Court of Appeals, 9th Circuit, said (18 F. (2d) at p. 21):

> "* * * it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in *clear and unequivocal* terms." (Italics supplied.)

The rule governing the construction of contracts in New York State has been expressed by its Court of Appeals in *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41, as follows:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in *unequivocal* terms." (Italics supplied.)

To same effect, 31 *Corpus Juris*, page 431.

The construction of the Circuit Court here has, at present writing, already permeated many pending cases resulting in the defense of various actions having been returned to the various assureds by their P. & I. underwriters on the ground that an assured is not covered for liabilities assumed by contract.

If it were the intention of a contracting stevedore to indemnify a shipowner for the latter's negligence, either sole or concurrent with that of the stevedore, the "Warshipsteve" contract would have provided, as the contract did in *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, aff'd 100 F. (2d) 1016 (C. C. A. 2), that indemnity was to be had for damages "for which either or both of the parties hereto may or shall be liable." *A priori*, no such result was ever intended by stevedores to the "Warshipsteve" contract (R. 142).

In attempting to distinguish the instant contractual interpretation from that of the same court in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199, the Court rested its distinction on the theory that a charterer was liable to an owner without any fault on his part. Of course, a charterer is only cast in damages for its negligence and a presumption of negligence exists where the scow, bailed in good condition, is returned in a damaged state. *C. F. Harms Co.* v. *Turner Const. Co.*, 3 F. (2d) 591 (C. C. A. 2). In the *Shamrock* case, the impleaded respondent (the case being in admiralty) was only held liable for half-damages

by this Circuit Court since the respondent was liable for its share of negligence, despite the indemnity clause there (Quoted at R. 130) which is similar in scope to the instant one. The attempted distinction by the Circuit Court is a distinction without a difference.

By judicial emasculation the Circuit Court has injected uncertainty and discord into maritime matters, where formerly uniformity existed.

That the determination of this problem is of prime importance to the shipping industry appears more fully from the statement in the affidavit of the Chairman of the Stevedoring Committee of the Maritime Association of the Port of New York. The same is set forth *in extenso*, since paraphrasing might be impertinence (R. 142, 143):

> "The opinion referred to is of particular importance not only to the Jarka Corporation of which I am the President, but, in my opinion, to all those engaged in Stevedoring operations, as all Stevedores working under U. S. Army Transport contracts had substantially the same indemnity clause.
>
> "If the liability imposed upon Stevedores as set forth in the opinion referred to is to remain unchanged, it will, in my opinion impose upon them an obligation not contemplated by them or the Government at the time they entered into the Army agreements which incorporate the indemnity clause above quoted."

THE U. S. LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT (33 U. S. C. A. §§ 901 *ET SEQ.*) HAS NOT CHANGED THE RULE OF CONTRIBUTION BETWEEN JOINT TORT FEASORS IN ADMIRALTY.

Prior to the passage of the U. S. Longshoremen's and Harbor Workers' Compensation Act in 1927, c. 509, § 1, 44 Stat. 1424, 33 U. S. C. A. §§ 901 *et seq.*, it was the fundamental tenet of admiralty that "the right to con-

tribution belongs to the substantive law of admiralty. It is not a mere inc ..nt of a form of procedure." Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.*, 218 U. S. 364, 31 S. Ct. 17. The right to contribution was a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

As late as October 1945 (3 months before the decision in the instant case), the Circuit Court of Appeals, 2nd Circuit, per Circuit Judge Learned Hand, had before it in *Barbarino* v. *Standope S. S. Co.*, 151 F. (2d) 553, the question as to whether an impleading petition in admiralty should have been dismissed by the trial court where the parties were identically situated, to wit, injured longshoremen suing the shipowner who had impleaded the contracting stevedore, employer of the injured longshoreman. In the cited case the court appreciated that the shipowner had a very real interest to hold in the stevedore impleaded in order to obtain contribution. The Court there said (151 F. 2d) 555):

> "* * * Whether that would be enough interest to support an appeal we need not decide, *because the suit is in the admiralty where contribution between joint tort feasors has existed since 1875.* The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

In holding in the case at bar that contribution does not lie *in admiralty* between shipowner and contracting stevedore as joint tort feasors, the Court virtually lifted by its bootstraps a concept of contribution from another field of jurisprudence and infused it into the maritime law. In so doing, reliance was placed upon *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wisc. 519, which were actions *at law* involving automobiles in which local statutes were con-

strued. Premising its conclusion upon the fact that a statutory immunity existed in favor of a contracting stevedore from suit by an injured employee under the Longshore Act, the Court has violated the *ratio decidendi* of this Court in such cases as *The Chattahoochee*, 173 U. S. 540 and *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Remedially, an injured longshoreman is relegated to compensation as against his employer. Nevertheless, the right to contribution between joint tort feasors *in admiralty* does not depend upon a common remedy *to the party injured.* "It (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173. Thus, it will be seen that under the Harter Act, 46 U. S. C. A. §§ 190 *et seq.*, the carrying vessel is immune by statute for damage to its cargo due to errors of navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carrying vessel one-half of the damages, paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be sued directly by the cargo owner. *The Chattahoochee, supra; Aktieselskabet Cuzco* v. *The Sucarseco, supra.*

Analogies respecting contribution attempted to be drawn from sources other than admiralty are without persuasive force. With due deference to the Circuit Court, it is respectfully submitted that the rationale of *The Tampico*, 45 F. Supp. 174 and *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, properly enunciates the law between shipowner and contracting stevedore since the enactment of the Longshore Act.

As was said in *The Tampico*, 45 F. Supp. 174, 175, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution:

"The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. The Hamilton, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (citation) Whatever its origin, the admiralty rule in this country is well known to be the other way. (citations) . . . Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450."

. . . . . .

"The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshoreman's) injuries furnishes no defense against Hedger's (shipowner's) claim to contribution as between joint tort-feasors." (Italics supplied.)

In *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, a shipowner in an independent admiralty action sought indemnity or contribution from the contracting stevedore for payments made to respondent's employee. The Court there said (p. 305 of 26 F. Supp.):

"If the longshoreman's right of action against the vessel was not taken away by the Act, he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

The petitioner is cognizant of Mr. Justice Frankfurter's statement in his concurring opinion in *Republic of Mexico* v. *Hoffman*, 324 U. S. 37, 39, that

"Adjudication should not borrow trouble by worrying about a case not calling for decision."

In line with such statement, it may be entirely consonant for this Court to leave unresolved the question of contribution *in admiralty* between shipowner and contracting stevedores, who had been held to be joint tort feasors. However that may be, the desideratum, oft expressed by this Court, that there be uniformity of decision in the Maritime Law, invites the attention and consideration of this Court.

A LONGSHOREMAN, HAVING ACCEPTED AND RETAINED COMPENSATION BENEFITS WITHOUT AN AWARD, HAS THEREBY ELECTED TO EXCLUSIVELY PURSUE HIS RIGHTS UNDER THE U. S. LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND SUCH WAS THE INTENT OF CONGRESS.

In limine, it must be appreciated that there certainly must be a serious question respecting the interpretation of § 933 (a) and (b) of 33 U. S. C. A. for the plethora of irreconcilable decisions to result, as presently exists. Determination is here sought of a judicial construction of subdivision (a) of § 933 of 33 U. S. C. A. and whether that subdivision has a meaning, separate and distinct from subdivision (b) of the same section. The same is not a matter of esoteric discussion.

It is the petitioner's contention that if a longshoreman's cause of action against a third party, after he has accepted compensation without an award, be suspended in mid-air or be within the "twilight zone" of the law, the cure-all is to come from the Congress. For judicial tribunals to embark and continue on a course of conduct, as they have done, is to recognize that they are indulging in "judicial legislation". This was appreciated by this very

Circuit Court in *Toomey* v. *Waterman S. S. Corp.*, 123 F. (2d) 718, 721, where it said:

> "It may be that it is more just to allow an employee to resort to both remedies than to have acceptance of compensation either with or without an award operate to divest his cause of action. *That, however, was a consideration for the law-making body.* In any event the chance for constant differences over an employee's understanding of his legal rights which is involved in the interpretation of the act sought by the plaintiff is far from desirable. *It would seem better that an employee who has accepted compensation should either lose his individual right to sue third parties or should retain both rights.* If he knows he is getting compensation, as he plainly did here, that in our opinion was enough." (Italics supplied.)

The Federal statute was modeled upon the New York State Workmen's Compensation Law as it existed in 1927. *Hunt* v. *Bank Line*, 35 F. (2d) 136 (C. C. A. 4); *The Employers' Liability Assurance Corporation Ltd.* v. *Monahan*, 91 F. (2d) 130 (C. C. A. 1). However, in 1937 subdivision (1) of Sec. 29 of the New York State Workmen's Compensation Act was amended so as to provide that an injured employee "need not elect whether to take compensation under this chapter or to pursue his remedy against such other, but may take such compensation and * * * pursue his remedy against such other subject to the provisions of this section." The very next year, 1938, the Congress amended only subdivision (b) of § 933 of 33 U. S. C. A. so that an assignment of the cause of action against the third person was effected only where an award was made. Subdivision (a) of § 933 was left intact. The purpose of this amendment to subdivision (b) of section 933 is gleaned from *Report No. 1945 of the House of Representatives, 75th Congress, Third Session*, dated March 14, 1938. So much of that report as deals with the amend-

ment of Section 933 (referred to as Section 33 in the report) reads as follows (p. 9 of said report):

> "The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person or to the beneficiaries in the case of death, to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury. In the proposed amendment the final clause of the present wording of this subdivision has been omitted as unnecessary. *This amendment follows the New York workmen's compensation law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action.*" (Italics supplied.)

It is patent that no reference is made to the 1937 amendment, *ante*, of the N. Y. State Workmen's Compensation Act. Surely, if Congress had intended by its 1938 amendment of subdivision (b) of § 933 of 33 U. S. C. A. to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the previous year's amendment of the New York State Workmen's Compensation Law. Is it not significant that the House of Representatives in the foregoing report only referred to the fact that it "follows the New York Workmen's Compensation Law, which contains a provision that

the 'awarding' of compensation shall operate as an assignment of the cause of action"? *Sequitur* that the provision for election under subdivision (a) exists separate and apart from the question of assignment under subdivision (b). In this connection, the statement of the Supreme Court of New Jersey in *Ross* v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported), is apposite (at pp. 734-735 of 1943 American Maritime Cases):

> "The subsequent amendment of subsection (b) of sec. 933 does not limit the scope or effect of the foregoing pronouncement. The only effect of the amendment was to postpone the transfer of the title to the cause of action against a third party until there has been an actual award of compensation under the Act. *The requirement for an election under subsection (a) was not changed by the amendment, nor deferred until such time as an actual award of compensation has been made. To hold otherwise would be, in effect, judicial legislation, and frustrate the evident intent of sec. 933 as a whole,* by permitting an injured employee to follow two remedies with the possibility of a double recovery in the event that the employer is content not to apply for an award." (Italics supplied.)

The Court in the *Ross* decision, *supra*, answered the contention that the third party, shipowner, may not avail itself of the situation by saying (p. 736):

> "* * * The defendant may avail himself of this as a defense, not because he has been or will be prejudiced by such conduct, *but because the plaintiff has relinquished the right to pursue his common law remedy against the defendant in order to avail himself of the remedy set up by the statute,* thus effecting a legal waiver, i. e. the voluntary relinquishment of a known right." (Italics supplied.)

The Circuit Court in the instant case did not give careful consideration to this all-important question of *election*

of remedy under the Longshore Act. The foregoing statement is buttressed by the fact that as authority for its holding that an injured longshoreman's capacity to sue is not impaired by his acceptance and retention of compensation, it cited the *Ross* case, *supra*. The holding in the *Ross* case stands opposed to the result in the case at bar.

This is indeed the very first case that has been presented to any Circuit Court squarely on the question of *election*. The same Circuit Court had before it *Grasso* v. *Lorentzen*, 149 F. (2d) 127 on April 9, 1945. A reading of that case will show unqualifiedly that the pleadings and decision concerned themselves with the *assignment* question under subdivision (b) of § 933.

The question of election has been before the District Courts on many occasions and a heterogeneity of decision has resulted. Holding that there is no impairment to sue a third party upon the acceptance and retention of compensation without an award, are:

Iaria v. *Silver Line*, 56 F. Supp. 42;
Cupo v. *Isthmian S. S. Co.*, 56 F. Supp. 45;
Brusich v. *Grace Line*, 56 F. Supp. 48;
Sessa v. *Weeks Stevedoring Co.*, 56 F. Supp. 50;
Grasso v. *Lorentzen*, 56 F. Supp. 51, aff'd 149 F. (2d) 127 (distinction noted, *supra*);
Tartaglio v. *Cunard White Star Line*, 56 F. Supp. 55.

Contra:

Ross v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported);
Bellantuono v. *American Export Lines, Inc.*, 1944 American Maritime Cases 437 (not officially reported).

In *Bellantuono* v. *American Export Lines, Inc., supra,* the District Court followed the yardstick enunciated by the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corporation,* 123 F. (2d) 718, that a conscious exercise of an election to take compensation precludes a third party action.

The New York Court of Appeals in *Ricciardi* v. *American Export Lines,* 294 N. Y. 812, affirming 268 App. Div. 606, has recently answered two questions certified by the Appellate Division, Supreme Court, 2nd Department. By its answers, the New York State Courts now follow those decisions of the District Courts which allow the prosecution of a third party action, after acceptance and retention of compensation without an award. In so doing, they are following the well established principle that federal court interpretation of a federal Act are imperative authorities for a state court. By so doing, they are following a trail of confusion as the District Courts are in disagreement with one another.

A stevedoring firm makes no voluntary payments to its injured longshoremen. The characterization of such payments as voluntary, as has been indulged by the Circuit Court, misconceives or overlooks the compulsion under which a stevedore pays compensation. *33 U. S. C. A. § 914 subd. a.* A stevedore cannot with impunity controvert a longshoreman's claim for compensation. Yet, it better had controvert every claim, for as the situation stands today, it steers its course in a maritime industry, sitting in a cockpit of confusion. Only by controverting every claim, with a possible resultant penalty therefor, can a stevedore or its compensation carrier be certain that its maximum liability will be $7,500, as provided by *§ 914 (m) of 33 U. S. C. A.*

The hardship and inequality of the protection to a stevedore under the Longshore Act is shown by the follow-

ing typical case. The longshoreman, having accepted compensation without an award, sues the shipowner in negligence and the shipowner impleads the stevedore under the contract of indemnity, *supra*. The compensation carrier or liability underwriter then returns the defense of the suit to the stevedore on the grounds that the stevedore may be held liable by virtue of its assumption by contract of the indemnification of the shipowner for the latter's negligence, as found by the Circuit Court in the instant case. Coverage is not afforded for assumed obligations. Recovery is then had by the longshoreman, whose capacity to sue has been held to be unimpaired, and the shipowner, on its contract of indemnity, despite its own negligence, recovers fully from the stevedore, who can look to no one for recoupment. The maximum liability of $7,500 under the Longshore Act fades into nothingness for oftentimes the recovery is very substantial. Certainly the result to the stevedore is harsh and anomalous.

No statement is more appropriate in closing upon this feature of the law than that, transplanted here, of Robinson in 44 *Harvard Law Review* 223, 257:

> "Enough is shown, however, to indicate the need for a thoroughgoing congressional re-survey of the entire field. It should seek to harmonize the law with itself and upon the central theme that the human and social problems of all the sufferers are the same. Whether they are workers in the maritime industry or its patrons affords in itself no distinction of value. In behalf of the patrons, historic survivals should be examined to ascertain their present justification."

THE CHARACTER OF A LITIGANT DOES NOT GIVE ADMIRALTY JURISDICTION OF THE NON-MARITIME FEATURES OF A CONTRACT.

There is a lack of clarity on the jurisdiction of admiralty respecting contracts partly maritime and partly non-maritime. *Robinson on Admiralty,* page 186. The fact that the United States is the indemnitee, so-called, under a contract, does not *ipso facto* confer jurisdiction in admiralty. That the same is true is supported by the very wording of Section 24, as amended, of the Judicial Code, 28 U. S. C. A. § 41, in contradiction to the interpretation of the Circuit Court of Appeals (R. 136). Under subdivision (1) of § 41 of 28 U. S. C. A. jurisdiction is conferred upon the district courts "of all suits of a civil nature, *at common law or equity,* brought by the United States". Subdivision (3) of § 41 of 28 U. S. C. A. confers jurisdiction of all civil causes of admiralty and maritime jurisdiction. It is not the character of the litigant that confers jurisdiction in admiralty but rather the cause of action or nature thereof. For as was said by Frederic Cunningham in 18 *Harvard Law Review* 294:

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. * * * It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate."

The indemnity portion of the "Warshipsteve" contract is non-maritime. Therefor, if judicial surgery were

performed upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A. Vapeur* v. *Bonnasse,* 19 F. (2d) 777, certiorari denied, *sub. nom., American Exchange Irving Trust Co.* v. *Bonasse,* 275 U. S. 551, 48 S. Ct. 114, the provisions of indemnity in the "Warshipsteve" contract comprise that part of the contract, which is non-maritime. Mr. Justice Brandeis' views in *Armour & Co.* v. *Fort Morgan S. S. Co.,* 270 U. S. 253, 46 S. Ct. 212, were that the contract must be "wholly maritime" for admiralty to have jurisdiction. Further, if exact precedent be necessary for a determination that admiralty does not possess inherent jurisdiction over a contract of indemnity, as is contained within the "Warshipsteve" contract, the Circuit Court needed but to resort to its own case of *The Wonder,* 79 F. (2d) 312, wherein Circuit Judge Augustus N. Hand said (79 F. (2d) at pp. 313, 314):

> "The original contract between the city and E. O. Roberts Company, Inc., provided that the contractor 'should be responsible for all injuries to persons or damage to prope ty either directly or indirectly that may result fron his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

Cases of maritime or non-maritime contracts have nurtured hair-splitting distinctions. 25 *Mich. L. Rev.* 289; 40 *Harvard L. Rev.* 1148; 41 *id.* 792. If certainty and uniformity of decision is the touchstone in admiralty, this Court should be the mason.

By this decision, diversity and confusion has been substituted for uniformity, which is the essence of admiralty jurisdiction. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 40 S. Ct. 438.

The decision of the Circuit Court of Appeals not only renders ineffectual the protection of the U. S. Longshoremen's and Harbor Workers' Compensation Act to the contracting stevedore, but also relegates the contracting stevedore to the position of unlimited and complete insurer for the negligence of the shipowner.

WHEREFORE, it is respectfully submitted that this case is one calling for the granting of a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO

and

UNITED STATES OF AMERICA,

Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO

and

UNITED STATES OF AMERICA,

Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

American Stevedores, Inc., by order of this Court (R. 113) granting certiorari, appeals from an order of the Circuit Court of Appeals, 2nd Circuit, modifying, and as so modified, affirming a decree of the United States District Court for the Southern District of New York (R. 91).

Opinions Below

The opinion of December 4, 1944 of the United States District Court for the Southern District of New York is not officially reported but appears at pages 68-71 inclusive of the record. The opinion of the Circuit Court of Appeals, 2nd Circuit, is officially reported at 153 F. (2d) 605.

Jurisdiction

The jurisdiction of this Court to entertain this appeal is provided by Section 240 (a) of the Judicial Code, Section 347 (a) of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5(b).

Statement of the Case

On September 23, 1942, the petitioner under a stevedoring contract with the United States (R. 14), known as a "Warshipsteve" contract, was loading the Navy Transport "Thomas Stone", owned by the United States (R. 13). Said transport was loaded with various supplies, military vehicles, and troops (R. 21, 41, 44) and an army officer had been assigned to the vessel as troop transport quartermaster (R. 44). He was supervising the loading of the vessel (R. 80) so that the cargo could be discharged "when the vessel went into action" (R. 27). The naval transport "Thomas Stone" was an "invasion ship" (R. 79).

One of petitioner's employees, Rosario Parello, while stowing cargo in the No. 1 hold of said vessel, was injured when a strongback or thwartship beam, together with several hatch covers, was caused to fall into the hold (R. 86).

The plans of this vessel called for a locking device to hold this strongback in place, but none was installed by the United States and, as the Circuit Court of Appeals found, no explanation for its absence was proffered by the United States (R. 87).

A military vehicle had been lowered into the hold of the vessel and had been landed upon the tank top preparatory to its being moved into a wing of the vessel's No. 1 hatch (R. 50, 87). In order to move this vehicle,

Di Mare, foreman of the hatch gang and an employee of the petitioner, ordered the vehicle raised (R. 51). After a repeat order, the vehicle was raised and in so doing it came in contact with this strongback and unseated it, precipitating it and several hatch covers into the hold striking Porello (R. 52, 87).

Porello brought an action on March 29, 1943, *in admiralty*, against the United States in the United States District Court for the Southern District of New York under the Suits in Admiralty Act (R. 2). Thereafter, an amended libel was filed (R. 9) and recited that the action was brought under the Public Vessels Act, 46 U. S. C. A. Sec. 781 (R. 9). The United States impleaded the petitioner herein under General Admiralty Rule 56 (R. 13), alleging that, if any negligence be established, it was solely American Stevedores, Inc., who was negligent and that it had agreed under its "Warshipsteve" contract to "be responsible for injury to persons through the negligence or fault of the Stevedore, his employees and servants" (R. 14).

Between the date of the accident, September 23, 1942, and July 30, 1943 (10 months), Porello received compensation benefits and medical attention aggregating $1,421.77, under the Longshore Act (R. 70, 80). These payments were not made under an award but they were retained by Porello (R. 81, 70). In fact, as appears from the foregoing, Porello received compensation for four months after the institution of his suit and retained the same (R. 76, 77).

The Trial Court found, upon the evidence adduced, that the United States had been negligent in that the beam or strongback contained only one locking device and was therefor defective (R. 70) and that the petitioner herein, having knowledge of that, had been negligent in the manner in which the cargo had been handled (R. 71). For the concurrent negligence, as so found, the Trial Court decreed that the libellant fully recover against

the United States and that the United States of America have *contribution* from the petitioner herein for one-half so paid (R. 72). A credit for the compensation benefits of $1,421.77 was allowed the petitioner herein (R. 70). The United States of America and the petitioner herein appealed (R. 73, 83) from such final decree (R. 71, 72) and the libellant filed assignments of error respecting the inadequacy of the award of damages.

The Circuit Court of Appeals, in agreeing with the Trial Court, held the absence of the lock and Di Mare's negligent handling of the cargo operated concurrently in producing the resultant injury and that the petitioner and the United States of America were joint tort feasors (R. 87, 88). However, the Circuit Court of Appeals held that contribution did not exist *in admiralty* in that there was not a common liability (R. 88). The Circuit Court of Appeals held there was jurisdiction under the Public Vessels Act (R. 86), increased the award to the libellant (R. 91), held that his capacity to sue had not been impaired by the acceptance and retention of compensation (R. 89), and that the United States of America was entitled to full indemnity under its "Warshipsteve" contract (R. 89). After the decision of the Circuit Court of Appeals, a Petition for Limited Rehearing was filed by the petitioner herein (R. 92) and the same was denied on January 31, 1946 (R. 103) with a *Per Curiam* opinion (R. 101). A motion to take additional testimony as to the intent of the parties to the indemnity provision in the "Warshipsteve" contract was filed (R. 104) and denied on February 19, 1946 (R. 112).

On March 25, 1946, American Stevedores, Inc., filed its petition for writ of certiorari and the same was granted on May 6, 1946 (R. 113).

Assignment of Errors

1. The Circuit Court of Appeals, Second Circuit, erred in holding that, under the Public Vessels Act, 46 U. S. C. A. § 781, the United States of America consented to be sued for personal injuries.

2. The Circuit Court of Appeals, Second Circuit, erred in holding that a longshoreman, having accepted and retained compensation benefits without an award, has not elected to pursue said remedy exclusively and was not precluded from bringing an action against a third party under 33 U. S. C. A. § 933 (a).

3. The Circuit Court of Appeals, Second Circuit, erred in holding that the United States of America under its "Warshipsteve" contract was entitled to full indemnity from a contracting stevedore where the negligence of each concurred in causing injuries to the stevedore's employee.

4. The Circuit Court of Appeals, Second Circuit, erred in holding that there was no contribution *in admiralty* between a shipowner and a contracting stevedore since the enactment of the United States Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, *et seq.*

5. The Circuit Court of Appeals, Second Circuit, erred in holding that an Admiralty Court had jurisdiction of the indemnity provision in the "Warshipsteve" contract.

POINT I

Under the Public Vessels Act of 1925, the United States has not consented to be sued for personal injuries or death and this conclusion is borne out by the legislative history of the enactment.

The government in its answer (R. 11) admitted that the U. S. S. "Thomas Stone", the vessel involved, was flying the American flag as a public vessel and commissioned by the United States of America to the United States Navy to be operated by the United States as a public vessel (see Article "Fourth" of amended libel [R. 9] and answer thereto [R. 11] by the government).

The impleading petition in its very first article (R. 13) alleges that the "Thomas Stone" was a public vessel.

Further, the proof is undisputed that she was a Navy transport, with an entire Navy crew (R. 38). Troop accommodations had been provided in the vessel on the second platform (R. 41).

The "Thomas Stone" was "an invasion ship" (R. 79). The loading thereof was in charge of an Army officer (R. 80), referred to as Troop Transport Quartermaster (R. 44).

On the facts adduced upon the trial of this action and upon the pleadings, the "Thomas Stone" was a public vessel. *Bradey* v. *United States*, 151 F. (2d) 742, cert. denied 66 S. Ct. 484, and cases cited in 151 F. (2d) at page 743.

The appellant directs itself to the legislative history of the Public Vessels Act (46 U. S. C. A. § 781).

In 1919 there were introduced in Congress two similar bills, known as S. 3076 and H. R. 7124. They were referred to the Committee on the Judiciary. While they

were in Committee, the Attorney General proposed a substitute bill.

A hearing was held on November 13, 1919 with respect to this latter bill (Hearing of the House Committee on Judiciary, S. 3076 and H. R. 7124, November 13, 1919, 66th Cong., 1st Session). The passage of this substitute bill was urged by steamship operators and owners and not in any respect by persons interested in personal injury claims. The hearing brought out clearly the fact that the proposed legislation under discussion did not embrace personal injury or death claims. At page 43 of the minutes of the hearing, the following is found:

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."
>
> "Mr. Husted: I think they should be, but we are simply considering now one class of cases. I think they should be. I think if a man is killed by the negligent act of the Government, he should not be compelled to wait upon Congress for some piece of legislation which will authorize him to go into the courts."

True it is that some Congressmen voiced the desirability of remedial legislation covering personal injuries. The same is found at page 44 of the minutes of the hearing, *supra:*

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of

Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

However, such legislation was not being proposed. For as Mr. Husted said, *supra:*

> "I think they should be, but we are simply considering now *one class of cases.*" (Italics supplied.)

It would appear that these bills did not get out of the Committee of the Whole House on the state of the Union to which they had been committed (Union Calendar No. 158), after having been reported with an amendment by the Committee on the Judiciary.

On February 2, 1921 Mr. Husted introduced bill H. R. 15977 in the House of Representatives, 66th Congress, 3rd Session. (60 Cong. Rec. 2478.) The bill provided, in part, as follows:

> "A libel in personam in admiralty may be brought against the United States for damages caused by collision by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1917: * * *"

Bill H. R. 15977 was referred to the Committee on the Judiciary. On Feb. 7, 1921, H. R. 15977 was reported with amendments, not material to the question at hand, and was committed to the Committee of the Whole House on the state of the Union (Union Calendar No. 439).

Report No. 1301, 66th Congress, 3rd Session, Feb. 7, 1921, accompanied this bill. It is noted in said report that proponents of the legislation were vessel operators and owners. The Committee noted the various organizations supporting the proposed legislation and refers to them by name. The Maritime Law Association of the United States submitted a brief relied upon in preparation of Report No. 1301.

At page 1 of H. Report No. 1301, the Committee sets forth the purpose of bill H. R. 15977, as follows:

> "*The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged* as the result of a collision with any Government-owned vessel, without requiring an application to Congress, in each particular instance, for the passage of a special enabling act."
>
> "The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which *private owners* have been allowed to submit to our admiralty courts admiralty claims of this character." (Italics supplied.)

As is evident from bill H. R. 15977, the minor purpose of said bill was to provide compensation for towage or salvage.

At page 4 of Report No. 1301, the Committee lists the Special Acts passed for the relief of *vessel owners* since 1900.

That the Committee was concerned solely with collision cases is shown by its development of the history of governmental immunity. At page 6 of said report, the Committee, in referring to an Act of June 24, 1910, authorizing the Secretary of Navy to adjust claims involving not more than $500 stated:

"This latter ($500) is, of course, wholly inadequate since the damages in *collision* cases are usually very large in amount." (Emphasis supplied.)

Report No. 1301 will be searched in vain for any suggestion that the purpose of H. R. 15977 embraced personal injury claims.

H. R. 15977 and H. R. 6256 (the latter being introduced by Mr. Husted on May 16, 1921—61 Cong. Rec. 1492) were not passed.

Instead, Congress on December 28, 1922 passed two statutes, 42 Stat. 1066, C. 16 (34 U. S. C. § 599) and 42 Stat. 1066, C. 17 (31 U. S. C. § 215). The former authorized the Secretary of Navy to settle claims for "damages to private property arising from collisions with naval vessels where amount of claim did not exceed $3,000." The latter permitted each department head to settle property damage claims up to $1,000. For a discussion of these laws, see House Report No. 913, 68th Congress, 1st Session, May 31, 1924, page 9 and 15 thereof.

On February 14, 1924, Mr. Underhill introduced in the House of Representatives, 68th Congress, 1st Session, bill H. R. 6989 (65th Cong. Rec. 2474). This bill was referred to the Committee on Claims (65 Cong. Rec. 2474).

On May 29, 1924, Mr. Underhill introduced in the House of Representatives, bill H. R. 9535 (65 Cong. Rec. 9919). This bill was intended as a substitute for H. R. 6989 and was referred to the Committee on Claims.

Two days thereafter, May 31, 1924, Mr. Edmonds, Chairman of the Committee on Claims, brought in H. Rep. No. 913, May 31, 1924, 68th Cong., 1st Session, which report was to accompany H. R. 9535. It is to be noted that, whereas H. R. 6989 had provided "for damages caused by *collision* by a public vessel," H. R. 9535 provided for suits "for damages *caused* by a public vessel."

H. Report No. 913 contained copies of correspondence between the Chairman of the Committee on Claims and various cabinet members as well as a memorandum of law, submitted by one of the cabinet members. The cabinet members recommended passage of H. R. 6989 (H. R. 9535 not being before them as the same was introduced on May 29, 1924, *supra*).

The legislative intent, as contained in Senate and House Reports, unequivocally indicate the purpose of the bills discussed heretofore. At pages 1 and 2 of H. Report No. 913, the following is stated:

> "H. R. 9535 is a substitute for H. R. 6989.
>
> The chief purpose of this bill is to grant *private owners of vessels and of merchandise* a right of action when their *vessels or goods have been damaged* as the result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act.
>
> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills under which *private owners* have been allowed to submit to our admiralty courts admiralty claims of *this character.*
>
> *Shipowners,* whose vessels have suffered a collision with any Government-owned ship in the public service and who have a cause of action under existing procedure, must apply to Congress for the passage of a special enabling act before suit can be brought in the admiralty courts. This situation naturally causes great delay as well as expense in the collection of claims against the Government, and very frequently works great injustice and sometimes bankruptcy to the *vessel owners.* With the enormous increase of Government-owned ships, both mercantile and war vessels, this delay and expense has become a matter of

serious consideration to our privately owned merchant marine. At the same time the business of Congress is occupied to a greater extent with these private bills, something which under present conditions should be eliminated." (Italics ours.)

At page 3 of said report the Committee stated:

"The special acts passed for the relief of *vessel owners* since 1919 illustrate the difficulty under the present system of securing permission even to institute litigation, without taking into consideration the delay in carrying on the litigation itself.

"During the Sixty-sixth Congress (1919-1921), 10 special acts were passed for the *relief of vessel owners.*

"During the Sixty-seventh Congress (1921-1923), 80 bills were filed with the committee and 27 were enacted into law.

"During the first session of the Sixty-eighth Congress upward of 80 special admiralty bills have been introduced in the House." (Italics ours.)

The evil which H. R. 9535 was designed to eliminate is clearly stated at page 2 of H. Report No. 913:

"Under the law as it now stands, no judicial relief is available to a *shipowner* for damages caused by the negligent navigation of a public vessel of the United States. * * * Nevertheless, the United States, while immune from the action of a private suitor in such cases, may, and does, sue *the vessels of private owners*, has its day in court without the risk of costs being awarded against it, and, when the Government vessel is found to have been at fault, refuses to pay the damages *sustained by the private owner.*" (The *Esparta*, 160 F. 289).

"The injustice of such a system of relief has often been expressly recognized by Congress and by the courts." (Italics ours.)

On May 31, 1924 H. R. 9535 was committed by the Committee on Claims to the Committee of the Whole House on the state of the Union. (Union Calendar No. 367.)

The discussion which took place on the floor of the House clearly shows that H. R. 9535 concerned itself solely with property damage.

The sponsor of the bill, Mr. Underhill, stated (66 Cong. Rec. 2087):

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels *whose property has been damaged by collision or other fault* of Government vessels and Government agents." (Italics supplied.)

Apprised, as they were, of the purpose of H. R. 9535, many Congressmen were concerned with personal injury claims, which all appreciated were not covered by the bill. Mr. Upshaw said (66 Cong. Rec. 2087):

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason of their being run over by Government trucks, *and things of that kind.* Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?" (Italics supplied.)

Mr. Underhill then replied (66 Cong. Rec 2087):

> "Well, we must take this idea up a step at a time, the first step, as I have explained, was a small claims bill. The second was a step in which the limit of $1,000 was raised to $3,000 as the amount which the Navy Department could settle for damages by naval vessels. This is the third step, and I am sure, if this passes both branches of Congress—and I have every reason to believe that it will pass the Senate as well

as the House—I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong', will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

That property damage was the only type embraced by this bill is found in the following colloquy between Mr. Underhill and Mr. MacLafferty at page 2088 of 66 Cong. Rec.:

Mr. Mac Lafferty:

"Supposing that I correctly understand this, it is provided that the suits can only be taken into the admiralty court where the blame has been laid on the Government. Is that true?"

Mr. Underhill:

"Not entirely; where a man's *property* is damaged, he can bring a suit." (Italics supplied.)

Mr. Underhill then stated (66 Cong. Rec. 2088):

"This measure is endorsed by every department of the Government, and more particularly by the State Department. The State Department, through Mr. Hughes, urges the passage of this bill on the ground that there is no medium now whereby claims can be adjudicated between our Government and foreign governments, and that results frequently in a large overcharge to the United States Government, due to the fact that the only way they can be settled is through the channels of diplomacy, and our Government, rather than err on the wrong side, is per-

haps too liberal in settling these claims for damages to *foreign vessels.*" (Italics ours.)

At pages 14 and 15 of Report No. 913, *supra*, Secretary Weeks states the *amount* of *property* claims was thereby extended in admiralty, in contrast to the settlement of small claims under the two statutes of December 28, 1922, *supra.*

Further discussion between Messrs. Blanton, LaGuardia, Denison, King and Underhill at page 2089 of 66 Cong. Rec. clearly shows that all were concerned with an alien suing the United States for collision and *property* damages and the possibility of the United States cross-libelling and obtaining security for the payment of any judgment the original libellant might be required to pay if the United States of America were successful in its cross-libel.

The bill passed the House on January 19, 1925 (66 Cong. Rec. 2089).

On January 20, 1925 H. R. 9535 was read to the Senate and referred to its Committee on Claims.

The Senate's attention was directed by Senator Bayard to S. Report No. 941, 68th Congress, 2nd Session, which was a duplicate of H. Report No. 913, *supra.* H. R. 9535 was reported by Mr. Bayard with an amendment (Calendar No. 1009). The amendment concerned itself solely with the retroactive date. The Senate desired 1917 in contrast to the House's 1920. After conference of the Senate and House Committees, it was decided to have the retroactive date 1920.

H. R. 9535 became the Public Vessels Act on March 3, 1925 (66 Cong. Rec. 5530).

It is interesting to note that on May 5, 1924, twenty-four days before the introduction of H. R. 9535 by Mr. Underhill, *supra*, Mr. Mills introduced in the House of Representa-

tives, 68th Congress, 1st Session, H. R. 9075 whose purpose it was, as appears from the caption, to amend the Act of March 9, 1920 (Suits in Admiralty Act). This bill was referred to the Committee on the Judiciary and was under consideration at the same time the Public Vessels Act was being considered. Hearings were held on this bill before the Committee on the Judiciary (Hearings of the House Committee on Judiciary on H. R. 9075, 1st Session, May 21, 1924). Many members of the Admiralty bar appeared at the Hearings and urged its passage. Among them were Judge Hough.

Judge Hough's remarks on the hearings, urging the passage of H. R. 9075, show that H. R. 9075 would amend the Suits in Admiralty Act so that said Act would be made applicable to all vessels, public and merchant. Thereby the United States would have been made liable for personal injuries and death, irrespective of the type of vessel, i. e., merchant or public.

H. R. 9075 never reached the floor of Congress.

In contrast, H. R. 9535, a *property* damage bill, became the Public Vessels Act. As has been indicated, *supra*, H. R. 9535 differed from its predecessor H. R. 6989 only in that there was inserted for "damages *caused by collision* by a public vessel" the words "damages *caused* by a public vessel".

Therefore, the question posed in the instant case is:

> Did Congress, by deleting the phrase, "by collision", when enacting H. R. 9535 as the Public Vessels Act, thereby negative its clear intention, as above indicated, to permit suits only for property damage?

We think this must be answered in the negative.

Surely, by omission of the phrase "by collision" Congress did not mean to include damages for personal injury

or death but envisioned such a state of facts as was subsequently presented to this Court in the case of *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215. (See page 26 hereof), to the Circuit Court of Appeals, 2nd Circuit, in *Great Lakes Dredge & Dock Co.* v. *Santiago S. S. Co. & U. S.*, 155 F. (2d) 148, to the District Court in *McCormack Sand & Gravel Corporation et al.* v. *United States of America*, unofficially reported in 1938 A. M. C., 1569, and to the District Court in *Martin Marine Transp. Co.* v. *United States*, 66 F. Supp. 673.

The deletion of the phrase "by collision" left unrestricted as to *cause* the damage to "owners of vessels whose *property* has been damaged by collision or other fault of government vessels and government agents". (See statement of Mr. Underhill, sponsor of H. R. 9535; 66 Cong. Rec. 208[illegible] see page 13 hereof.)

It is the position of the petitioner that collision by a public vessel was eliminated as the sole cause for damage but that the nature or quality of damages was still confined to *property* damages, in contradistinction to personal injury damages.

The House and Senate reports, the extracts quoted therefrom, and the colloquys between Congressmen which reflect the very marrow of the Public Vessels Act can only lead a traveler along the road of legislative intent to one road sign—the Public Vessels Act does not embrace personal injury damage. In contrast to the statement of Mr. Justice Rutledge in *Hust* v. *Moore McCormack Lines*, unofficially reported in 66 S. Ct. 1218, 1231, where a different statute was being interpreted, the legislative intent, as gleaned from reports, documents, etc., controls the crucial problem presented in this case.

What Congress intended at a certain time may often be determined by a study of its subsequent conduct. And so, true to his promise to work on a bill covering personal in-

jury claims, discussed *supra*, Mr. Underhill on January 30, 1926 introduced in the House of Representatives, 69th Congress, 1st Session, H. R. 8651 (67 Cong. Rec. 3071). Context of bill found at 67 Cong. Rec. 10029. The bill was "to provide for the settlement of claims against the United States on account of property damage, personal injury, or death." It was referred to the Committee on Claims, whose report (H. Rep. No. 667, 69th Congress, 1st Session) was rendered on March 26, 1926.

The bill was divided into three Titles. As to Title I captioned "Property Damage Claims" the bill provided that claims, not exceeding $5,000 in amount, could be settled by heads of departments; that the District Court should have concurrent jurisdiction with the Court of Claims of claims in excess of $5,000, but not in excess of $10,000.

Section 8 (3) of Title I of H. R. 8651 provided that the provisions covering property damage should not apply to any claim for which liability of the Government was recognized by the Suits in Admiralty Act of March 9, 1920 or the Public Vessels Act of March 3, 1925.

Title II of H. R. 8651 captioned "Personal Injury and Death Claims" conferred authority upon the United States Employees Compensation Commission to award and pay compensation for claims of personal injury and death. Maximum liability of the United States was $5,000 (Sec. 204 [a] [5]) and said coverage was afforded only for claims subsequent to April 6, 1920 (Sec. 201 [d]).

Under Section 212 (a), of Title II, claims covered by the Federal Employees' Compensation Act were excluded from the benefits of the instant bill and Section 212 (b) excluded claims by any member of the military or naval forces in case where relief was provided by other laws.

Title III, captioned "Miscellaneous" is not important to the instant problem.

These exclusions become important as they are a signpost of the types of claims covered by other Acts. Since the Public Vessels Act provided for recovery of property damage, where public vessels were concerned, the proposed legislation excluded all cases of property damage, embraced by the Public Vessels Act of the year before.

Since no mention is made in H. R. 8651 of personal injuries under the Public Vessels Act, it is clearly inferable that no coverage was afforded by the Public Vessels Act for personal injuries.

Significant is Mr. Celler's statement at pages 10031-10032 of 67 Cong. Rec. in the discussion of the proposed legislation:

> "It may, therefore, be too early for me to advocate the proposition that the United States district court should open its doors for the purpose of redressing wrongs involved in negligence and other torts resulting in personal injury or death with no limitation as to the amount of recovery. That is the goal toward which we are inevitably tending."

On February 5, 1926 H. R. 8651 was committed to the Committee of the Whole House on the state of the Union. Through Mr. Underhill's efforts, said bill passed the House.

On December 21, 1925, approximately a month before H. R. 8651 was introduced in the House by Mr. Underhill, Mr. Means introduced in the Senate, bill S. 1912 which was the same in purpose, although not as extensive in scope or draftmanship. (67 Cong. Rec. 1233.) Said bill was referred to the Committee on Claims. S. 1912 was reported with one amendment, not here material. That bill was passed by the Senate on March 15, 1926.

On March 17, 1926, S. 1912 was referred to the House Committee on Claims. On March 26, 1926 it was reported

with amendments and committed to the Committee of the Whole House on the State of the Union. (Union Calendar No. 225.) On June 10, 1926, the House resolved itself into a Committee of the Whole for consideration of Senate bill S. 1912. It proceeded to amend the Senate bill to conform to Mr. Underhill's bill H. R. 8651 (67 Cong. Rec. 111086, 111099 to 11111). As so amended, S. 1912 passed the House. S. 1912, with its amendments, was not repassed and therefore the attempt in 1926 to obtain legislation respecting personal injury and death claims failed.

Significant, though, is the attempt of both branches of Congress, one year after the passage of the Public Vessels Act, to obtain remedial legislation for governmental torts resulting in personal injury and death. In so doing, no indication is given by Congress that any remedy existed for such torts under the Public Vessels Act.

On January 13, 1928, Mr. Underhill, still striving to have legislation enacted covering personal injury claims, introduced in the House of Representatives, 70th Congress, 1st Session, bill H. R. 9285 (69 Cong. Rec. 1468). Copy of this bill appears at 70 Cong. Rec. 4837. Title I of this bill concerned itself with property damage and gave to the District Court jurisdiction of claims in excess of $5,000 but not in excess of $10,000. Section 8 (a)(3) of said bill excepted, from the coverage of the bill, property damage claims arising under the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925.

Title II of said bill is captioned "Personal Injury and Death Claims." Section 202 (a) permits awards up to $7,500. Section 208 (a) of this Title excepts, from the coverage of the bill, claims for which compensation is provided by the Federal Employees' Compensation Act and Section 208 (b) excepts any claim for injury or death incurred in the line of duty by any member of the military or naval forces of the United States where relief is provided by other law.

Title III of said bill is captioned "Miscellaneous" and has no bearing on the instant question.

Here again is evidence by Congress that the Public Vessels Act did not cover personal injury claims as no mention is made in Title II of the coverage of personal injuries by the Public Vessels Act, although specific reference is made to property damage, embraced by the Public Vessels Act, in Title I of bill H. R. 9285.

This bill was referred to the Committee on Claims whose report (H. Rep. No. 286, 70th Cong., 1st Session, Jan. 16, 1928) recommended passage of the bill. On January 16, 1928 H. R. 9285 was committed to the Committee of the Whole House on the state of the Union (Union Calendar No. 61). This bill was debated in the House on January 30, 1928 (69 Cong. Rec. 2184). The following colloquy took place during the course of debate (69 Cong. Rec. 2184):

> "Mr. Underhill: * * * Two important acts were the act of 1922, known as the Underhill small claims act, which gave the departments the power to settle property damage up to $1,000 and the admiralty act of 1925 (Public Vessels Act) which authorizes suits to be brought against the United States in admiralty for damages occasioned by Government-owned vessels.
>
> * * * *
>
> Mr. Montague: Did those cases arise out of contract or tort?
>
> Mr. Underhill: Those cases were for *property* damage." (Italics supplied.)

On February 17, 1928, H. R. 9285 passed the House. In the Senate H. R. 9285 was referred to the Committee on Claims. This Committee brought in S. Rep. No. 1699, 70th Congress, 2nd Session. It was recommended that H. R. 9285 pass with certain amendments, the same being re-

ported by Mr. McMaster. At page 7 of S. Rep. No. 1699 this statement is found:

> "No provision has been made for suit against the United States with respect to personal injury or death claims."

This bill was passed in both the Senate and the House but received a pocket veto by the President (70 Cong. Rec. 5217, 5220, and 5230).

Repeated efforts have been made since H. R. 9285 to enact legislation affording a remedy to personal injury or death claimants. Until 1946, no judicial relief was afforded for personal injury or death claims except by way of the time-honored practice of passing private bills. Thus, it will be observed that on March 15, 1937 bill H. R. 601 (Private No. 9) was approved by Congress. It is captioned *An Act For the Relief of Edna M. Callahan and Anna Scott*, found in 50 Statutes at Large, Part 2, page 927. Another bill to the very same effect and covering the very same accident, although relating to two other persons, was passed and is captioned *An Act For the Relief of Margaret Grace and Alice Shriner*, found in 50 Statutes at Large, Part 2, page 922. House Reports No. 33 and No. 322, 75th Congress, 1st Session, cover these Acts. By this legislation Congress awarded various sums out of any money in the Treasury, not otherwise appropriated, for injuries sustained by the claimants through the negligence of the United States which caused an explosion on a Navy vessel plying between the Fifth Street Landing at San Pedro, California, and the United States ship "Relief" lying in San Pedro Harbor.

Beyond dispute, this naval vessel was a public vessel. Further, if another remedy, other than by private bill, were available to these claimants, the Committee on Claims would have been precluded by its own Rule 15 from consideration of these claims. Rule 15 of the Rules of the

House Committee on Claims, existent for many years, provides:

> "Rule 15 precludes consideration of any claim over which another tribunal, court, or department has jurisdiction, while such jurisdiction is not exhausted. In the settlement of claims, Congress is always the place of last resort. If other resort or manner of obtaining redress against the Government has been provided (as in the jurisdiction of the Court of Claims, the revenue laws, and bond redemption statutes, for example), it obviously was provided by the Congress, and the committee will insist that such jurisdiction be exhausted. A failure by claimant to furnish the proof required by the court or department for determination of his claim is not exhausting the remedy provided, and the committee will not recognize such cases. In the great majority of claims entertained by the committee, however, no other source of redress has ever existed."

It will, therefore, be seen that by its very own construction of its own legislation Congress and its Committees realized that the Public Vessels Act did not give a remedy for personal injury or death. If said Act had provided a remedy, the Committee on Claims would not have awarded damage to Edna M. Callahan, Anna Scott, Margaret Grace and Alice Shriner.

Porello, in his brief in opposition to the appellant's petition to this Court, attempted to analyze, at page 4 of his brief, the Special Acts which have been discussed, *supra*. He characterized the aforementioned Acts, as referring to accidents ashore, compensation claims and appropriations by Congress where claims were settled without a law suit.

On the face of the Special Acts it will be seen that these accidents did not occur ashore, but on the contrary occurred on the naval launch in question. These injuries were third party injuries and were not compensation claims.

In amplification of the point that these claims were paid by appropriations of Congress in order to avoid the necessity of a lawsuit, Porello assumed that the answer to the question in issue was that a suit was authorized by the Public Vessels Act. He sets forth no authority that litigation was permitted. He further sets forth no authority that any administrative agency was authorized to settle such claims. Indeed, no authorization for the settlement of such claims by any administrative agency was possible at that time.

For, it was not until July 3, 1943, that the President of the United States approved a bill which authorized the Secretary of War to adjust claims for property damage, personal injury, or death, caused by military personnel, or otherwise, incident to the non-combat activities of the War Department or of the Army (89 Cong. Rec. 7160). Said Act became § 223b of Title 31, U. S. Code.

Even as to this Act of July 3, 1943, the authority of the Secretary of War to adjust claims for property damage, personal injury, or death, was limited to the amount of $500 or, in time of war, to the amount of $1000.

On December 28, 1945, the President of the United States approved a bill which gave to the Secretary of Navy the same authority as that conferred upon the Secretary of War in 1943. The Act of December 28, 1945 became § 223 d of Title 31, U. S. Code.

The movement in Congress to afford a remedy for personal injury claims or death claims, still went on apace.

Thus, we find on August 2, 1946, the President of the United States signing bill S. 2177 (92 Cong. Rec. A5251—unbound advance sheet for August 12, 1946*).

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* Reference is here made to pages of unbound advance sheets which we understand do not always coincide with pages of bound volumes, when the same are issued.

Title IV of said act is captioned "Federal Tort Claims Act". § 421 of Part 4 of said Act excepts, from the coverage of said Act, claims arising under certain statutes or conditions. Subdivision d of said section exempts claims for which a remedy is provided by the Suits in Admiralty Act or the Public Vessels Act.

The discussion in the Congress, with respect to the Federal Tort Claims Act, is not helpful to a determination of the instant question.

Therefore, there still is left open for determination the question as to whether the Public Vessels Act embraced within its confines claims for personal injury damage or death.

On the basis of the legislative history and Congressional intent, as exhibited throughout the 27 years from 1919 until 1946, it is respectfully submitted that by the Public Vessels Act the United States has not consented to be sued for a claim for personal injury damage or for death.

There has been no decided case which has expressly held that the Public Vessels Act gives a remedy against the United States for claims on account of personal injury or death.

In *O'Neil* v. *United States*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, Judge Campbell, although stating the purpose of the Act (p. 870), decided the case on the theory that an employee of the United States was not given any rights under this statute against the United States, his employer. This theory compelled the Circuit Court of Appeals, 2nd. Circuit, to conclude that a naval officer could not recover for the unseaworthiness of a submarine in *Dobson* v. *United States*, 27 F. (2d) 807, cert. denied 278 U. S. 653, No. 556. The question raised in the instant case was left open in the *Dobson* case, as appears from the statement at page 808 of said case:

"Appellee, on the other hand, argues that the statute should be construed as limiting recovery to dam-

ages to property and not contemplating compensation for loss of life. We do not find it necessary to determine this question in the present case."

It is clear that in the *Dobson* case, *supra*, the Circuit Court of Appeals for the Second Circuit, left open the question as to whether the Public Vessels Act provided a remedy for property damage only.

The question raised by this appeal was not before the Court in *Bradey* v. *United States*, 151 F. (2d) 742, cert. denied 66 S. Ct. 484, wherein it was held, following the *Dobson* case, *supra*, that a fireman on a destroyer had no remedy against the United States under the Public Vessels Act but was relegated to pension rights under other laws.

In *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, this Court traced the legislative history of the statute here involved and settled the controversy as to whether the phrase "damages *caused* by a public vessel" meant "damages caused by *collision*" only. This Court there did not consider whether the term "damage" meant "property damage" solely or embraced personal injury damage. The following statement, appearing at page 218 of 324 U. S. shows that this Court had in mind that the Public Vessels Act was a bill for the relief of shipowners:

> "The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private *vessel owners* an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States." (Italics supplied.)

Although this Court did not have before it in the *Canadian Aviator* case the question now presented, the opinion contained certain statements which are enlightening.

This Court said the following (324 U. S. 223):

> "In 1924, H.R. 6989 was introduced in the House of Representatives, its provisions being similar to

those of the Public Vessels Act as adopted, with this material difference: Section 1 of that bill authorized suit against the United States 'for damages caused *by collision* by a public vessel.' (Italics added) On reference to the House Committee on Claims, a substitute bill, H.R. 9535, was reported to the House. This bill provided for suits 'for damages caused by a public vessel of the United States.' This bill with the latter phrase included subsequently became the Public Vessels Act. This change in the language of the Act prior to its adoption convinces us that Congress intended to authorize suits in other than collision cases. The sponsors of the bill in both houses of Congress understood that it extended to cases where damage was done 'by collision, or other fault of Government vessels and Government agents'.* Moreover, Congressional reports on this bill and the course of discussion in the numerous hearings held on predecessor measures to the present bill, indicates that authority to sue was not to be limited to cases where the vessel was the physical instrument that caused the physical damage."

Thus used, Mr. Underhill's statement to the House of Representatives indicated that the damages for which Congress had consented to be sued were those caused not only "by collision" but also by "other fault of Government vessels and Government agents".

It must not be overlooked however that Mr. Underhill's statement shows that the only damages, for which the

* 66 Cong. Rec. 2087. Representative Underhill, the sponsor of the bill, stated:

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

Public Vessels Act was intended to be a remedy, were damages to "owners of vessels whose property has been damaged".

In the course of its opinion this Court, in the cited case, made statements which must be considered in the light of the factual situation then under review. They are as follows:

At page 224 of 324 U. S.:

> "The consent to suit embodied in the Act thus extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage to *other* ships, their cargoes, and personnel, regardless of physical contact between the two ships, and where principles of admiralty law imposed liability on private parties. There seems no logical reason for allowing recovery for collision and refusing recovery for damages caused by other movements of the offending vessel". (Italics supplied.)

. . . . . .

And at page 228 of 324 U. S.:

> "Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed by the admiralty law on the private shipowner, it remains to be considered whether petitioner states a valid cause of action under general principles of admiralty law, in rem and in personam."

At first blush, these might appear to be statements that the Public Vessels Act permits suits for personal injuries.

We are sure that such a conclusion does not necessarily follow. The reason for this is obvious. The *Canadian Aviator* decision involved only property (hull) damage to the "Cavelier" resulting from her grounding, while fol-

lowing a naval patrol boat which was piloting the steamer in Delaware Bay.

Under the rule of law requiring strict construction of statutes waiving sovereign immunity (*United States* v. *Sherwood*, 312 U. S. 584; *Eastern Transportation Company* v. *United States*, 272 U. S. 675) and under the legislative history, *supra*, there is no jurisdiction of a cause of action for personal injuries under the Public Vessels Act.

POINT II

A longshoreman, having accepted and retained compensation benefits without an award, has thereby elected to exclusively pursue his rights under the U. S. Longshoremen's and Harbor Workers' Compensation Act and such was the intent of Congress.

If this Court decides that there is jurisdiction under the Public Vessels Act, 46 U. S. C. A., §781, for a personal injury claimant to sue the United States of America, the question which next presents itself is the capacity of Rosario Porello, the injured longshoreman, to institute the suit at bar.

On the other hand, should this Court determine that there is no jurisdiction under the Public Vessels Act for the institution of the suit against the Government, it may bypass any determination on the remaining questions raised by the petitioner here.

Therefore, it may be entirely consonant for this Court to leave unresolved the remaining questions presented on this appeal. However that may be, the *desideratum* oft-expressed by this Court, that there be uniformity of decision in the Maritime Law (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438), invites the attention and consideration of this Court.

As has been stated heretofore, p. 3 hereof, Porello received compensation benefits and medical attention aggre-

gating $1,421.77 under the Longshoremen's Act (R. 70, 80). In fact, Porello received compensation for four months after the institution of his suit and retained the same (R. 76, 77).

It is petitioner's position that by the acceptance and retention of said compensation payments, Porello evidenced his election, upon the receipt of the first compensation payment on October 5, 1942, to accept compensation under Section 33(a) of the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 933a) and that he ratified and confirmed his election made on October 5, 1942, by accepting and retaining the payments covering the four month period after the institution of this suit.

By reason thereof, the Court had no jurisdiction to grant any recovery herein to him. Such defense was pleaded in petitioner's answer (R. 16, 17). It is not contended by the petitioner that under Section 933b of 33 U. S. C. A. that there was an assignment of Porello's cause of action against the United States to a third person, but that under Section 933a, the receipt of such compensation payments by Porello constituted an irrevocable election of his right to take compensation, which right is exclusive of all other rights or remedies (33 U. S. C. A. § 905).

It is the petitioner's contention that if a longshoreman's cause of action against a third party, after he has accepted compensation without an award, be suspended in mid-air or be within the "twilight zone" of the law, the cure-all is to come from the Congress. For judicial tribunals to embark and continue on a course of conduct, as they have done, is to recognize that they are indulging in "judicial legislation". This was appreciated by the Circuit Court of Appeals, 2nd Circuit in *Toomey* v. *Waterman S. S. Corp.* 123 F. (2d) 718, 721, where it said:

> "It may be that it is more just to allow an employee to resort to both remedies than to have ac-

ceptance of compensation either with or without an award, operate to divest his cause of action. *That, however, was a consideration for the law-making body.* In any event the chance for constant differences over an employee's understanding of his legal rights which is involved in the interpretation of the act sought by the plaintiff is far from desirable. *It would seem better that an employee who has accepted compensation should either lose his individual right to sue third parties or should retain both rights.* If he knows he is getting compensation, as he plainly did here, that in our opinion was enough." (Italics supplied.)

The Federal statute was modeled upon the New York State Workmen's Compensation Law as it existed in 1927. *Hunt* v. *Bank Line*, 35 F. (2d) 136 (C. C. A. 4); *The Employers' Liability Assurance Corporation Ltd.* v. *Monahan*, 91 F. (2d) 130 (C. C. A. 1). However, in 1937, subdivision (1) of Sec. 29 of the New York State Workmen's Compensation Act was amended so as to provide that an injured employee "need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and * * * pursue his remedy against such other subject to the provisions of this section." The very next year, 1938, the Congress amended only subdivision (b) of § 933 of 33 U. S. C. A. so that an *assignment* of the cause of action against the third person was effected ~~only~~ where an award was made. Subdivision (a) of § 933 was left intact. The purpose of this amendment of subdivision (b) of section 933 is gleaned from Report No. 1945 of the House of Representatives, 75th Congress, 3rd Session, dated March 14, 1938.

At page 9 of said report the purpose of the amendment is stated and concludes as follows:

"This amendment follows the New York workmen's compensation law, which contains a provision that the

'awarding' of compensation shall operate as an assignment of the cause of action."

It is patent that no reference is made to the 1937 amendment, *ante*, of the N. Y. State Workmen's Compensation Act. Surely, if Congress had intended, by its 1938 amendment of subdivision (b) of § 933 of 33 U. S. C. A., to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the previous year's amendment of the New York State Workmen's Compensation Law. Is it not significant that the House of Representatives in the foregoing report only referred to the fact that it "follows the New York Workmen's Compensation Law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action"? *Sequitur* that the provision for election under subdivision (a) exists separate and apart from the question of assignment under subdivision (b). In this connection, the statement of the Supreme Court of New Jersey in *Ross* v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported), is apposite (at pp. 734-735 of 1943 American Maritime Cases):

> "The subsequent amendment of subsection (b) of sec. 933 does not limit the scope or effect of the foregoing pronouncement. The only effect of the amendment was to postpone the transfer of the title to the cause of action against a third party until there has been an actual award of compensation under the Act. *The requirement for an election under subsection (a) was not changed by the amendment, nor deferred until such time as an actual award of compensation has been made. To hold otherwise would be, in effect, judicial legislation, and frustrate the evident intent of sec. 933 as a whole,* by permitting an injured employee to follow two remedies with the possibility of

a double recovery in the event that the employer is content not to apply for an award." (Italics supplied.)

The Court in the *Ross* decision, *supra,* answered the contention that the third party, shipowner, may not avail itself of the situation by saying (p. 736):

"* * * The defendant may avail himself of this as a defense, not because he has been or will be prejudiced by such conduct, *but because the plaintiff has relinquished the right to pursue his common law remedy against the defendant in order to avail himself of the remedy set up by the statute,* thus effecting a legal waiver, i. e. the voluntary relinquishment of a known right." (Italics supplied.)

The Circuit Court in the instant case did not give careful consideration to this all-important question of *election of remedy* under the Longshore Act. The foregoing statement is buttressed by the fact that as authority for its holding that an injured longshoreman's capacity to sue is not impaired by his acceptance and retention of compensation, it cited the *Ross* case, *supra.* The holding in the *Ross* case stands opposed to the result in the case at bar.

This is indeed the very first case that has been presented to any Circuit Court of Appeals squarely on the question of *election.* The same Circuit Court on April 9, 1945 had before it *Grasso* v. *Lorentzen,* 149 F. (2d) 127, cert. denied 66 S. Ct. 57. A reading of that case will show unqualifiedly that the pleadings and decision concerned themselves with the *assignment* question under subdivision (b) of § 933.

The question of election has been before the District Courts on many occasions and a heterogeneity of decision has resulted. Holding that there is no impairment

to sue a third party upon the acceptance and retention of compensation without an award, are:

Iaria v. *Silver Line*, 56 F. Supp. 42;
Cupo v. *Isthmian S. S. Co.*, 56 F. Supp. 45;
Brusich v. *Grace Line*, 56 F. Supp. 48;
Sessa v. *Weeks Stevedoring Co.*, 56 F. Supp. 50;
Grasso v. *Lorentzen*, 56 F. Supp. 51, aff'd 149 F. (2d) 127 (distinction noted, *supra*);
Tartaglio v. *Cunard White Star Line*, 56 F. Supp. 55.

Contra:

Ross v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported);
Bellantuono v. *American Export Lines, Inc.*, 1944 American Maritime Cases 437 (not officially reported).

In *Bellantuono* v. *American Export Lines, Inc.*, *supra*, the District Court followed the yardstick enunciated by the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, that a "conscious exercise" of an election to take compensation precludes a third party action.

The New York Court of Appeals in *Riociardi* v. *American Export Lines*, 294 N. Y. 812, affirming 268 App. Div. 606, has recently answered two questions certified by the Appellate Division, Supreme Court, 2nd Department. By its answers, the New York State Courts now follow those decisions of the District Courts which allow the prosecution of a third party action, after acceptance and retention of compensation without an award. In so doing, they are following the well established principle that federal court interpretation of a federal Act are imperative authorities for a state court. By so doing, they are following a trail of confusion as the District Courts are in disagreement with one another.

A stevedoring firm makes no voluntary payments to its injured longshoremen. The characterization of such payments as voluntary, as has been indulged by the Circuit Court of Appeals, misconceives or overlooks the compulsion under which a stevedore pays compensation. *33 U. S. C. A. § 914 (a)*. A stevedore cannot with impunity controvert a longshoreman's claim for compensation. Yet, it better had controvert every claim, for as the situation stands today, it steers its course in a maritime industry, sitting in a cockpit of confusion. Only by controverting every claim, with a possible resultant penalty therefor, can a stevedore or its compensation carrier be certain that an award will be made, which would work an assignment of a longshoreman's right against a third party, and that under that award its maximum liability will be $7,500, as provided by *§ 914 (m) of 33 U. S. C. A.*

The hardship and inequality of the protection to a stevedore under the Longshore Act is shown by the following typical case. The longshoreman, having accepted compensation without an award, sues the shipowner in negligence and the shipowner impleads the stevedore under the contract of indemnity, *supra*. The compensation carrier or liability underwriter then returns the defense of the suit to the stevedore on the grounds that the stevedore may be held liable by virtue of its assumption by contract of the indemnification of the shipowner for the latter's negligence, as found by the Circuit Court in the instant case. Coverage is not afforded for assumed obligations. Recovery is then had by the longshoreman, whose capacity to sue has been held to be unimpaired, and the shipowner, on its contract of indemnity, despite his own negligence, recovers fully from the stevedore, who can look to no one for recoupment. The maximum liability of $7,500 under the Longshore Act fades into nothingness for oftentimes the recovery is very substantial. Certainly the result to the stevedore is harsh and anomalous.

POINT III

A contracting stevedore is not an indemnitor or insurer of a shipowner's negligence, absent unequivocal or clear language to that effect in the stevedoring contract.

American Stevedores, Inc. was impleaded pursuant to a "Warshipsteve" contract, the so-called indemnity provision of which reads as follows (R. 14):

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants".

It will be noted that the words "indemnify" or "hold harmless", etc., are absent from the quoted clause of this "Warshipsteve" contract.

The law on the subject of the responsibility of contracting stevedore to shipowner under a stevedoring contract has hitherto been enunciated by the Circuit Court of Appeals for the 9th Circuit in *United States* v. *Wallace*, 18 F. (2d) 20, and by the Circuit Court of Appeals for the 1st Circuit in *Weldon* v. *United States*, 65 F. (2d) 748. In concluding that the provision for indemnity in the "Warshipsteve" contract in the case at bar entitled the United States, shipowner, to full indemnity, the Circuit Court of Appeals reiterated the rationale of the *Wallace* case, *supra*, yet arrived at a diametrically opposed result. This, despite the rule of thumb in the *Wallace* case (18 F. (2d) 21):

> "As is pointed out in Perry v. Payne, *supra, we should not, in the absence of language free from all*

doubt, conclude that the parties intended the contractor should assume an obligation which, for a single act of negligence on the part of the owner, or of one of its employees, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." (Italics supplied.)

The result of the *Wallace* case becomes indeed salient by virtue of the fact that the Court there was interpreting a United States Shipping Board contract, which incorporated an indemnity clause similar to the instant one, and in the cited case the United States, shipowner, was held solely at fault.

In *Weldon* v. *United States*, 65 F. (2d) 748, the Circuit Court of Appeals, 1st Circuit, was confronted with the construction and interpretation of a United States Shipping Board Merchant Fleet Corporation contract, which contained a *similar indemnity clause* (p. 749 of 65 F. (2d) middle of right hand column—Compare indemnity clause in instant matter at pp. 14 and 66 of Record). In construing this contract, the Court in the cited case said (65 F. (2d) at p. 749):

"It would be *extraordinary* to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work. *If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so.*" (Italics supplied.)

Yet the very judicial result which would be extraordinary to the Circuit Court of Appeals, 1st Circuit, becomes the reasonable pattern of interpretation for the Circuit Court of Appeals, 2nd Circuit. This irreconcilable conflict becomes the warp and woof of this appeal.

In refuting the argument of the petitioner that this "Warshipsteve" contract should be interpreted so that complete indemnity could only be had if the contracting stevedore were solely negligent, the Circuit Court said (R. 88):

> "The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured."

The same is palpably erroneous in that the person injured might very well not be the stevedore's employee in which event the stevedore might, under the facts, be liable for its negligence. Cogency for this argument is found in the very wording of *General Admiralty Rule 56* which reads in part as follows:

> "* * * Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; * * *."

If the injured person were not the employee of the assured, and if the stevedore were found negligent, then the decree *in admiralty* would run directly against the stevedore.

Various Circuit Courts and other tribunals have characterized the terms or language of a contract which warrant the judicial interpretation that a contractor or indemnitor will indemnify another contractor for the latter's negligence.

To accomplish that result the Circuit Court of Appeals, 7th Circuit, in *North American Ry. Const. Co. v. Cincin-*

nati Traction Co., 172 F. 214, said *clear* language must be utilized. The Circuit Court of Appeals, 5th Circuit, in *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen*, 74 F. (2d) 983, said such a result required *unequivocal* terms. The Circuit Court of Appeals, 4th Circuit, in *Washington & Berkeley Bridge Co.* v. *Pennsylvania Steel Co.*, 215 F. 32, 34, said:

> "The presumption is exceedingly strong against an undertaking by any one except an indemnity company to be responsible for the negligent acts of another."

In *United States* v. *Wallace et al.*, *supra*, the Circuit Court of Appeals, 9th Circuit, said (18 F. (2d) at p. 21):

> "* * * it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in *clear and unequivocal* terms." (Italics supplied.)

The rule governing the construction of contracts in New York State has been expressed by its Court of Appeals in *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41, as follows:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in *unequivocal* terms." (Italics supplied.)

To same effect, 31 *Corpus Juris*, page 431.

The construction of the Circuit Court here has, at present writing, already permeated many pending cases resulting in the defense of various actions having been returned to the various assureds by their P. & I. underwriters on the ground that an assured is not covered for liabilities assumed by contract.

If it were the intention of a contracting stevedore to indemnify a shipowner for the latter's negligence, either sole

or concurrent with that of the stevedore, the "Warshipsteve" contract would have provided, as the contract did in *Kogusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, aff'd 100 F. (2d) 1016 (C. C. A. 2), that indemnity was to be had for damages "for which either or both of the parties hereto may or shall be liable."

This "Warshipsteve" contract between the petitioner herein and the Government is to be accorded no bizarre interpretation merely because the United States is a contracting party (R. 65). This Court, as recently as March 25, 1946, in *S. R. A. Inc.* v. *State of Minnesota*, 66 S. Ct. 749 said (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court. United States v. Allegheny County, supra, 322 U. S. at page 183, 64 S. Ct. at page 914, 88 L. Ed. 1209. * * * *Normally, contracts between the United States and others are construed as contracts between private parties.* Lynch v. United States, 292 U. S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434." (Italics supplied.)

It is respectfully urged by the petitioner that this "Warshipsteve" contract commands "normal" construction. The words used in the contract and the construction thereof are usual.

The opinion of the District Court (R. 68), the findings of fact (R. 70) and conclusions of law (R. 71), made by that tribunal, are entirely silent as to this so-called contract of indemnity. In fact, the record will be searched in vain to find any suggestion that the United States contended in the District Court that it was entitled to be indemnified *wholly* where its negligence concurred with that of the petitioner herein.

In fact, resorting to the plain intendment of the impleading petition of the United States of America, it will be observed that the "Second" paragraph of said impleading petition (R. 14) alleges that the libelant's injuries were due "*solely* to the negligence, if any negligence be established, of American Stevedores, Inc.," by reason of which the United States of America under the provision in the "Warshipsteye" contract was entitled to indemnity.

The first time that the contract assumed any stature or proportion on the proposition of *full* indemnity was its appearance in the assignments of error filed by the government (R. 73). It is interesting to note the relative importance of that question by its position as No. 20, the very last assigned error (R. 74).

When the Circuit Court of Appeals construed the contract as it did, American Stevedores Inc. petitioned the Circuit Court of Appeals for a limited rehearing (R. 92), confined to the interpretation placed by the Circuit Court of Appeals upon this contract. There was cited to the Court (R. 96) its own decision in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199.

In the *Per Curiam* opinion denying the aforementioned petition for limited rehearing (R. 101), the Circuit Court of Appeals, in attempting to distinguish the instant contractual interpretation from its interpretation in the *Shamrock* case, *supra*, rested its distinction on the theory that a charterer may be liable to an owner without any fault. "A charterer is only cast in damages for its negligence and a presumption of negligence exists where the scow, bailed in good condition, is returned in a damaged state. *C. F. Harms Co.* v. *Turner Const. Co.*, 3 F. (2d) 591 (C. C. A. 2). In the *Shamrock* case, the impleaded respondent (the case being in admiralty) was only held liable for half-damages by the Circuit Court of Appeals since the respondent was held liable for its share of negligence, despite the indemnity clause there (Quoted at R. 96), which is similar in scope to the instant one.

The attempted distinction by the Circuit Court of Appeals is a distinction without a difference. By judicial emasculation the Circuit Court of Appeals has injected uncertainty and discord into maritime matters, where formerly uniformity existed.

As stated in the petition for limited rehearing to the Circuit Court of Appeals (R. 99), American Stevedores Inc. moved that Court on February 4, 1946 for leave of court to take proof for submission to that Court as to the intent of the parties to the "Warshipsteve" contract (R. 104).

Annexed to the notice of motion were the affidavits of the Chairman of the Stevedoring Committee of the Maritime Association of the Port of New York (R. 107) and of the Vice-President and Operating Manager of American Stevedores Inc. (R. 105). Unequivocally, these gentlemen state that, at the time the "Warshipsteve" contract was drafted covering the Port of New York, it never was the intention of any stevedore, including American Stevedores Inc., to indemnify the United States for its own negligence but that indemnity was only provided for the stevedores' own negligence. Where the negligence of each concurred in producing harm, it was the intention that each would be responsible for their respective negligence (R. 105, 108).

It is to be noted that no opposing affidavits were submitted by the United States of America. To the mind of the petitioner herein, the reason is patent—the result, arrived at by the Circuit Court of Appeals was never intended by the contracting parties to the "Warshipsteve" contract.

Silence of the United States of America on this proposition constitutes an acquiescense in the stated intentions of the parties to this "Warshipsteve" contract.

In determining the scope or meaning of this contract, the interpretation placed upon it by the parties themselves is entitled to great, if not controlling, influence. *Old Colony Trust Co.* v. *City of Omaha*, 230 U. S. 100, 33 S. Ct. 967.

It is respectfully submitted that the interpretation placed upon this contract by the Circuit Court of Appeals, Second Circuit, is erroneous.

POINT IV

The U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901 *et seq.*) has not changed the rule of contribution between joint tort feasors in admiralty.

We have discussed, *supra*, the "Warshipsteve" contract and the interpretation placed upon same by the Circuit Court of Appeals, 2nd Circuit, in the case at bar. In order to reach the question of the interpretation of the "Warshipsteve" contract in logical sequence, the Circuit Court of Appeals considered firstly the question of jurisdiction under the Public Vessels Act (R. 86) and the question of proximate cause (R. 87). It decided that jurisdiction lay under said statute and that the United States of America and American Stevedores, Inc., were joint tort feasors since the negligence of each "operated concurrently in producing the result" (R. 88).

Proceeding upon such a finding of joint wrongdoing, the Circuit Court of Appeals then held that contribution between these joint tort feasors did not lie, since a common liability on the part of the United States of America and American Stevedores, Inc. did not exist (R. 88). That conclusion stemmed from the fact that compensation was the exclusive remedy of the libellant as respects American Stevedores, Inc.

Having held that contribution did not lie, the Court then proceeded to the interpretation of the "Warshipsteve" contract (R. 88). In its *Per Curiam* opinion denying limited rehearing (R. 101), the Circuit Court of Appeals stated that the point of contribution may be considered left open since determination of the contribution question was not

essential to decision in view of the indemnity provided by the "Warshipsteve" contract.

This petitioner has traced the rationalization of the Circuit Court of Appeals on the question of contribution for the petitioner feels that that question must be resolved, since the "Warshipsteve" contract did not and was never intended to indemnify the United States for its negligence, where said negligence concurred with that of the stevedore.

It is a fundamental tenet of admiralty that "the right to contribution belongs to the substantive law of admiralty. It is not a mere incident of a form of procedure." Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.*, 218 U. S. 264, 31 S. Ct. 17. The right to contribution is a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

As late as October 1945 (3 months before the decision in the instant case), the Circuit Court of Appeals, 2nd Circuit, per Circuit Judge Learned Hand, had before it in *Barbarino* v. *Stanhope S. S. Co.*, 151 F. (2d) 553, the question as to whether an impleading petition in admiralty should have been dismissed by the trial court where the parties were identically situated, to wit, injured longshoremen suing the shipowner who had impleaded the contracting stevedore, employer of the injured longshoreman. In the cited case the court appreciated that the shipowner had a very real interest to hold in the stevedore impleaded in order to obtain contribution. The Court there said (151 F. (2d) 555):

> "* * * Whether that would be enough interest to support an appeal we need not decide, *because the suit is in the admiralty where contribution between joint tort feasors has existed since 1875.* The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

In holding in the case at bar that contribution does not lie *in admiralty* between shipowner and contracting stevedore as joint tort feasors, the Circuit Court virtually lifted by its bootstraps a concept of contribution from another field of jurisprudence and infused it into the maritime law. In so doing, reliance was placed upon *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wisc. 519, which were actions *at law* involving automobiles in which local statutes were construed. Premising its conclusion upon the fact that a statutory immunity existed in favor of a contracting stevedore from suit by an injured employee under the Longshore Act, the Court has violated the *ratio decidendi* of this Court in such cases as *The Chattahoochee*, 173 U. S. 540 and *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Remedially, an injured longshoreman is relegated to compensation as against his employer. Nevertheless, the right to contribution between joint tort feasor *in admiralty* does not depend upon a common remedy *to the party injured.* "'t (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" Judge Thomas Thacher in *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173. Thus, it will be seen that under the Harter Act, 46 U. S. C. A. §§ 190 *et seq.*, the carrying vessel is immune by statute for damage to its cargo due to errors of navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carrying vessel one-half of the damages, paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be liable to the cargo owner. *The Chattahoochee, supra; Aktieselskabet Cuzco* v. *The Sucarseco, supra.*

Analogies respecting contribution attempted to be drawn from sources other than admiralty are without persuasive force. With due deference to the Circuit Court, it is re-

spectfully submitted that the rationale of *The Tampico*, 45 F. Supp. 174 and *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, properly enunciates the law between shipowner and contracting stevedore since the enactment of the Longshore Act.

As was said in *The Tampico*, 45 F. Supp. 174, 175, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution:

> "The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. The Hamilton, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (citation) Whatever its origin, the admiralty rule in this country is well known to be the other way.' (citations) • • •". Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450."
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>
> *"The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshoreman's) injuries furnishes no defense against Hedger's (shipowner's) claim to contribution as between joint tort-feasors."* (Italics supplied.)

In *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, a shipowner in an independent admiralty action sought indemnity or contribution from,

the contracting stevedore for payments made to respondent's employee. The Court there said (p. 305 of 26 F. Supp.):

> "If the longshoreman's right of action against the vessel was not taken away by the Act he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

The District Court and the Circuit Court of Appeals, 2nd Circuit, have bypassed completely any discussion of active and passive negligence, primary and secondary liability. The finding that the negligence of the respondent and respondent-impleaded operated concurrently to produce the result militates, to the mind of the petitioner herein, against any consideration of active and passive negligence.

Whether the finding that the United States of America and American Stevedores Inc. were joint tort feasors connotes a joint operation or common degree of fault, *in pari delicto*, is unimportant. This action, being in admiralty, is governed by the maritime substantive concept of division of damages in contradistinction to the Continental rule of comparative negligence. Many writers have rebelled against this concept, steeped in American maritime law, and yet have recognized its existence and application. See *Robinson on Admiralty*, 1939, pages 853-864; Swan, J., in *Luckenbach Steamship Company Inc.* v. *United States of America*, unofficially reported in 1946 A. M. C. 1120, 1123; Clark, J., in dissenting opinion in *Harbor Oil Transport Co.* v. *The Plattsburgh Socony*, 151 F. (2d) 708.

For a full and comprehensive study of the right to divided damages being a substantive right in admiralty, see *Joe Intagliata* v. *Shipowners and Merchants Towboat*

Ltd., 26 C. (2d) 365, 159 P. (2d) 1, unofficially reported in 1946 A. M. C. 263.

It is therefore respectfully submitted that, at most, in admiralty, contribution lies between joint tort feasors and that the U. S. Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901 *et seq.*, has not changed that rule.

POINT V

Admiralty does not have jurisdiction of the non-maritime features of the "Warshipsteve" contract and jurisdiction in admiralty cannot rest upon the fact that the United States is the indemnitee.

The Circuit Court of Appeals, Second Circuit, in its main opinion (153 F. (2d) 605-608), by-passed any discussion as to the jurisdiction of that Court as a Court of admiralty over the contract here involved.

It assumed, by silence, the jurisdiction of that Court in admiralty over the "Warshipsteve" contract, despite the fact that that issue was raised by the pleadings (see Fourth allegation of impleading petition (R. 14) and answer thereto of American Stevedores, Inc., in its Eighth paragraph (R. 16)).

When that Court was apprised, by the petition for limited rehearing (R. 92), of the fact that it had not determined the question of admiralty jurisdiction, it covered the same in a *Per Curiam* opinion (153 F. (2d) 609) in which it said:

> "Nor need we be troubled by doubt as to admiralty jurisdiction extending to a contract of indemnity, since jurisdiction *could* rest on the fact that the indemnitee is the United States, 28 U. S. C. A. 41 (1); see Tuthill v. United States, D. C. N. D. Ill., 38 Fed. 538,

appeal dismissed, 136 U. S. 652, 10 S. Ct. 1075, 34 L. Ed. 557." (Italics supplied.)

Discussion of the above quotation is found at page 51 hereof.

There is a lack of clarity on the jurisdiction of admiralty respecting contracts partly maritime and partly non-maritime. *Robinson on Admiralty*, page 186.

Where the district court sits as a court of admiralty, it must determine at the very outset the power that has been conferred upon it to determine and rule upon the subject matter of the suit in question.

In the instant case, it was incumbent upon the court sitting in admiralty to determine whether the subject matter of the claim against the petitioner-appellant herein was within the admiralty and maritime jurisdiction.

It is not the character of the litigant that confers jurisdiction in admiralty but rather the cause of action or nature thereof.

This has been oft-expressed by this court. In 1920, this Court, through Mr. Justice McReynolds, said in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, 42 S. Ct. 157, 158:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the *nature* of the transaction and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled. (Citing cases)." (Italics supplied.)

To same effect see:

North Pac. S. S. Co. v. *Hall Bros. Marine Ry. & S. Co.*, 249 U. S. 119.

The difficulty of keeping, separate and distinct, concepts of admiralty jurisdiction and those of common law jurisdiction in our system of federal jurisprudence has been appreciated by many writers. For, as was said by Frederic Cunningham in 18 *Harvard Law Review* 294:

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Court undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. * * * It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate."

An admiralty court cannot take unto itself, by means of General Admiralty Rule 56, a claim which is not cognizable in admiralty *Aktieselskabet Fido* v. *Lloyd Brasiliero*, 283 F. 62, cert. denied 43 S. Ct. 97.

In the case at bar, American Stevedores, Inc. was impleaded by the United States (R. 14) solely on the indemnity provision contained in an agreement dated July 12, 1942. This agreement is the forerunner of the "Warshipsteve" contract. For the evolution of that contract, see footnote 1 at page 501 of *Compilation of Standard Contract Forms of the War Shipping Administration*, printed 1945 for use of Committee on the Merchant Marine and Fisheries.

As pointed out, *supra*, conflict exists with respect to what is a maritime contract and what is non-maritime.

Mr. Justice Brandeis' views in *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 46 S. Ct. 212, were that the

contract must be "wholly maritime" for admiralty to have jurisdiction.

Even if judicial surgery were performed upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A. Vapeur* v. *Bonnasse*, 19 F. (2d) 777, certiorari denied, *sub. nom., American Exchange Irving Trust Co.* v. *Bonasse*, 275 U. S. 551, 48 S. Ct. 114, the provisions of indemnity in the "Warshipsteve" contract comprise that part of the contract which is non-maritime.

Further, if exact precedent be necessary for a determination that admiralty does not possess inherent jurisdiction over a contract of indemnity, as is contained within the "Warshipsteve" contract, the Circuit Court needed but to resort to its own case of *The Wonder*, 79 F. (2d) 312, wherein Circuit Judge Augustus N. Hand said (79 F. (2d) at pp. 313, 314):

> "The original contract between the city and E. O. Roberts Company, Inc., provided that the contractor 'should be responsible for all injuries to persons or damage to property either directly or indirectly that may result from his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

We have heretofore (p. 48) quoted from the Circuit Court's opinion dealing with the proposition that jurisdiction *could* rest upon the fact that the United States was the indemnitee.

In support of its quoted statement, the Circuit Court refers to 28 U. S. C. A. § 41 (1). An examination of that section (Section 24, Judicial Code) shows that it

refers to the United States as plaintiff in "civil suits at *common law or in equity.*" That it does not refer to proceedings in admiralty is apparent, not only from a reading of Section 1 of the enactment, but subsection 3 of the same statute covers "all civil causes of admiralty and maritime jurisdiction". Therefore, jurisdiction of the instant proceeding, in so far as the indemnity clause is concerned, cannot be bottomed on the section of the enactment cited by the Circuit Court in support of its statement as to jurisdiction. *Tuthill* v. *United States*, 38 Fed. 538 (Northern District of Illinois, 1889), appeal dismissed 136 U. S. 652, does not support the quoted statement of the Circuit Court. There, plaintiff instituted suit to recover his claim against the United States for services rendered by him while acting as District Attorney in the Northern District of Illinois. The United States, defendant, sought to off-set or counter-claim for a sum in excess of $1000, which was the jurisdictional amount for which suits could be brought under the statute upon which plaintiff's cause of action was based. The Court, in the cited case, held that the set-off, or counter-claim, would lie.

It is respectfully submitted that no jurisdictional grounds have been found by the Circuit Court of Appeals in this case to sustain the jurisdiction of the court over this contract of so-called indemnity. That the *potentialities* of jurisdiction have their roots in the character of the litigant, as suggested by the use of the word "could" in the above quotation by the Circuit Court of Appeals, indicates the fallacy into which the Circuit Court of Appeals has fallen.

The non-maritime indemnity provision, upon which the United States relies, is beyond the pale of admiralty jurisdiction.

Cases of maritime or non-maritime contracts have nurtured hair-splitting distinctions. 25 *Mich. L. Rev.* 289; 40 *Harvard L. Rev.* 1148; 41 *id.* 792.

If certainty and uniformity of decision is the touchstone in admiralty, this Court should be the mason.

Conclusion

The United States of America, under the Public Vessels Act, did not consent to become suable for a personal injury claim. Sovereign immunity not having been waived by the Act with respect to a personal injury claim, the District Court had no jurisdiction initially to entertain this proceeding.

If this Court should determine that jurisdiction existed under the Public Vessels Act for the assertion of a personal injury claim, the libellant herein has precluded himself from asserting any claim thereunder by reason of his having elected his remedy exclusively under the U. S. Longshoremen's & Harbor Workers' Compensation Act in that he has accepted and retained compensation benefits paid to him under the authority of said Act.

If this Court should determine that the United States of America has consented to be sued under the Public Vessels Act for a personal injury claim and that the libellant's capacity to sue was unimpaired by his acceptance and retention of compensation, nevertheless the District Court, sitting as a court of admiralty, had no jurisdiction to entertain the non-maritime clause of indemnity in the "Warshipsteve" contract and that court, as a court of admiralty, cannot, by means of General Admiralty Rule 56, extend its jurisdiction and encompass a non-maritime contract.

The petitioner herein, under the so-called indemnity clause of the "Warshipsteve" contract, was not called upon to indemnify the United States of America, as shipowner, for the latter's negligence or for the defective condition of its vessel.

The United States of America, as shipowner, is only entitled, at most, to obtain from the appellant contribution for one-half of its damages by virtue of the time-honored substantive rule in admiralty of contribution between joint

tort feasors, which rule has not been changed by the U. S. Longshoremen's & Harbor Workers' Compensation Act.

The decree, appealed from, should be reversed with directions that a decree be entered dismissing the libel.

Respectfully submitted,

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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DEC 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO and UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF OF PETITIONER TO BRIEFS OF ROSARIO PORELLO AND UNITED STATES OF AMERICA

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The petitioner herein, American Stevedores, Inc., would be remiss in its duties to this Court were it to leave unanswered the briefs of both respondents.

In discharge of such duty, the petitioner herein replies.

As to Porello's brief:

Pp. 1, 2, 9, 21: There is interspersed throughout Porello's brief the statement that the United States of America has not appealed to this Court from the decree holding the United States of America liable under the Public Vessels Act. What weight this contention can possibly have defies the petitioner's appreciation. It is fundamental and familiar learning that the question of jurisdiction is always before the Court. It cannot be consented to by the parties and cannot be conferred by them. In fact, many courts have stated that the question of jurisdiction must be raised by the Court *sua sponte*.

In the case at bar, the respondent, United States of America filed exceptions (R. 5) and exceptive allegations (R. 6) to the original libel instituted under the Suits in Admiralty Act (R. 2). After the order was signed overruling the exceptions (R. 8), Porello, *of his own volition*, filed an amended libel alleging a cause of action under the Public Vessels Act (R. 9). For a detailed discussion of the initial pleadings, see page 6 of petitioner's main brief. After the decree holding the United States of America initially liable (R. 72), said respondent appealed to the Circuit Court of Appeals, 2nd Circuit, and assigned as Errors No. 1 and No. 2 the failure to dismiss the libel for lack of jurisdiction under the Public Vessels Act (R. 73).

When *United States of America* v. *Lauro* (No. 514, transferred to the summary docket and assigned for argument immediately following the case at bar, 1946 A. M. C. 1496), was before District Judge Abruzzo, *sub. nom. Lauro* v. *United States*, 63 F. Supp. 538, the Government contended as follows (p. 539):

> "The respondent claims the word 'damages' in this section means only damage to property and not damage to person."

When the *Lauro* case was appealed by the Government to the Circuit Court of Appeals, the very same contention was briefed and argued. In fact, in the question certified by the Circuit Court of Appeals, 2nd Circuit, on September 11, 1946, the following is found (p. 417 of 157 F. 2d):

> "On this appeal, the respondent-appellant, contended that the said Public Vessels Act of 1925 provided a *remedy against the United States for damage to property only, but not for damage to a person or damage arising by reason of the death of a human being.*" (Italics supplied.)

In fact, although the Government does not indicate in its memorandum in this Court in the *Lauro* case (No. 514), the question certified to this Court in said case was upon oral motion of Government's counsel.

Further, the Government has very recently urged the same defense, to wit, no coverage for personal injuries under the Public Vessels Act, in a case tried, but yet undetermined, before District Judge Knox, of the Southern District of New York, in *Vacante* v. *U. S. A.* and *Marra Bros. Inc.*, Admiralty 140-169.

As a complete answer to Porello's solicitations, that the United States of America did not appeal to this Court in the case at bar, there can be but two possible answers. Either the Government was content not to urge further the jurisdictional question of the Public Vessels Act by virtue of the fact that it had been indemnified wholly under the "Warshipsteve" contract, as interpreted by the Circuit Court of Appeals, 2nd Circuit, or the attorneys representing the United States of America inadvertently failed to timely petition this Court for a writ of certiorari. This petitioner is in no position to answer for the Government's actions save to indicate the foregoing as dispositive of the entreaties of Porello.

Pp. 2 and 9: At this point of the case at bar, it seems in rather poor taste for Porello to vacillate as to the character of the vessel involved and to attempt to seek refuge in the unrequited hope that perhaps the "Thomas Stone" was a merchant vessel. At page 2 of Porello's brief, it is stated "while stowing *general* cargo * * *" (italics supplied). By referring to R. 120, which is page 86 as stamped, cited by Porello in support of said statement, it will be seen that nowhere is the cargo described as *general* cargo. Again, in Porello's brief at page 9, 2nd paragraph from the bottom of the page, the statement is made that the vessel was not a war vessel etc. In view of the pleadings (see page 3 of petitioner's main brief) and in view of the proof adduced by the

parties (see page 6 of petitioner's main brief—also Government's Exhibit M (R. 66) as showing the cargo involved) the weakness of Porello's position is patent.

Pp. 4, 5, 6, 7, 8, 9, 22: At page 4 Porello seeks solace in the language of Senator Bayard, as covering personal injury claims. He dismisses without any consideration the statement of the sponsor and draftsman of the Public Vessels Act, Mr. Underhill, that the bill only covered *property* damage (see page 14 of petitioner's main brief). Mr. Underhill, in January, 1928, as sponsor of H.R. 9285, which was 3 years after the Public Vessels Act, stated once again, when asked about the Public Vessels Act, that the Public Vessels Act, which he fathered, was for *property damage only* (see pages 20 and 21 of petitioner's main brief). Porello indicates at pages 4 and 7 of his brief that only after the restriction limiting causes of action to property damage resulting from collision was stricken out was the Public Vessels Act enacted. As petitioner has indicated at page 17 of its main brief, *collision causing damage* was only removed but the same left undisturbed the term damages, which meant only *property damage*. The phrase "*property damage*", referred to on page 4 of the brief of Porello, as having been removed before Congress gave favorable consideration to the bill, *never was in the draft of any bill respecting public vessels.* Collision as a *cause* was removed so as to embrace those *causative* factors as are set forth at page 17 of petitioner's main brief.

Further, if, as is contended for at pages 7 and 8 of Porello's brief, the *Suits in Admiralty Act* and the *Public Vessels Act* must be read together, then Congress' attempt in 1924 to enact H.R. 9075 (see page 16 of petitioner's main brief), which would have amended the Suits in Admiralty Act so that it would be applicable to public as well as merchant vessels, was an idle gesture. We don't think Congress embarks upon such a course of conduct.

In an abortive effort to explain away the Special Acts for the *Relief of Edna M. Callahan, Anna Scott, Margaret Grace and Alice Shriner* (see pages 22 and 23 of petitioner's main brief), Porello at pages 4 and 5 of his brief makes some interesting statements. He argues that the passage of these Special Acts "does not indicate that these people could not have maintained actions against the government". In support of that statement, which we respectfully submit is completely erroneous, there is cited a letter of Claude A. Swanson. That letter will be searched in vain *for even a subtle suggestion* that these claimants could maintain actions against the government. Claude A. Swanson's letter is found at pages 2 and 3 of H. Report 33, 75th Congress, 1st Session. On page 2, Secretary Swanson sets forth the facts of the accident as found by the investigation conducted by a board of the Navy Department whose opinion it was that the explosion in question was due to the material used and to the negligence of the Navy personnel. At page 3 of H. Report 33, Secretary Swanson sets forth the injuries as found by Lt. Commander Dearing of the Medical Corps. Secretary Swanson concludes only as follows:

> "* * * no recommendation can be made as to what constitutes reasonable compensation in each case. However, the amount provided in bill H.R. 6129 appear to be very excessive."

To show the complete fallacy of Porello's argument, we respectfully direct this Court's attention to H. Report 322, 75th Congress, 1st Session (see page 22 of petitioner's main brief), which report covered 2 of the aforementioned claimants. As part of said Report, a letter from N. H. Standley, Acting Secretary of the Navy, is appended and forms pages 2 and 3 of H. Report 322. In said letter, Secretary Standley states (page 3 of H. Report 322):

> "Under date of Dec. 3, 1932, an inquiry was submitted to the Navy Department by Birney Donnell,

Esq., attorney at law, Los Angeles, Calif., on behalf of Miss Grace, concerning the submission of a claim for the injuries sustained. In his communication, Mr. Donnell stated that Miss Grace's injuries consisted of second and third-degree burns and that she had incurred expenses for physicians, nurses and medicines. *In reply to this communication the Navy Department stated that there was no authority of law whereby the Navy Department could adjust claims for personal injuries.*" (Italics supplied.)

This letter is dated February 9, 1934. As the petitioner indicated at page 24 of its main brief, it wasn't until December 28, 1945 that the Secretary of Navy was given limited authority to adjust claims (31 U. S. C. A. § 223d).

Further, Rule 15 of the Rules of the House Committee on Claims would have precluded said Committee from consideration of these claims, which eventuated in Special Acts, if any other method of obtaining redress were available (see page 23 of petitioner's main brief).

In order to destroy completely any further argument that might be advanced by Porello, we take this opportunity of indicating to this Court that *no appropriations by way of Special Acts are necessary when a department of the Government settles a claim or pays a judgment entered upon any decree.* The statement at page 5 of Porello's brief, 1st full paragraph thereof, is entirely untrue.

The appeal that is made to this Court by Porello that it would be unconscionable to think that Congress intended to deprive personal injury claimants of any relief is answered eloquently by the remarks of the sponsor of the Public Vessels Act, Mr. Underhill, found at pages 14 and 21 of petitioner's main brief.

However much an appeal can be made to sympathy, it must always be borne in mind that the sovereign is in-

volved and that immunity from suit is waived in very few instances. The need for reform has been appreciated although the absence of remedy has been simultaneously recognized: *Holtzoff, Tort Claims against the United States* (1941); 4 Fed. B. A. J. 163; 25 A. B. A. J. 828 (1939); *Kleplinger, Hints on Suing Uncle Sam* (May 1943), 47 (No. 2) Law Notes 25. It wasn't until August 2, 1946 by the Federal Tort Claims Act that relief and remedy was afforded (see page 24 of petitioner's main brief).

Porello has attempted, at page 8 of his brief, to indicate that an inference can be drawn from this Court's discussion of the *Dobson* and *O'Neal* cases in the *Canadian Aviator Ltd.* case that if the two suitors had not been members of the personnel of the vessels the action could have been maintained under the Public Vessels Act. In such contention, Porello has overlooked completely what the Circuit Court of Appeals said in the *Dobson* case (p. 808 of 27 F. 2d):

> "Appellee, on the other hand, argues that the statute should be construed as limiting recovery to damages to property and not contemplating compensation for loss of life. *We do not find it necessary to determine this question in the present case.*" (Italics supplied.)

It is the petitioner's position that not only did this Court not decide in the *Canadian Aviator* case the question presented on this appeal but that it inferentially, by denial of certiorari in the *Dobson* case, 278 U. S. 653, No. 556, approved of the reasoning of the Circuit Court of Appeals, which, as we indicated above, left the question now presented unanswered. This is in line with Mr. Justice Frankfurter's statement in his concurring opinion in *Republic of Mexico* v. *Hoffman*, 324 U. S. 37, 39, that

> "Adjudication should not borrow trouble by worrying about a case not calling for decision."

The Wright cited by Porello, at page 9 of his brief, is clearly inapposite to the instant question. As a reading of said case will show, it was a *collision* case and the question disposed of was the question of interest prior to a decree fixing the liability of the two vessels.

P. 10: Porello has cited *Grasso* v. *Lorentzen*, which has been distinguished by petitioner at page 33 of its main brief on the basis that the pleadings and decision will show that the question there involved was *assignment* and not *election*. *The Etna*, cited by Porello at page 10 of his brief, does not cover the situation here presented. In the last cited case, the only question the Circuit Court of Appeals, 3rd Circuit, decided was the equitable right of the employer to intervene in a suit instituted by its employee against a shipowner in order to impress a lien upon and recover against a fund which had been deposited in the registry of the Admiralty Court. This fund represented the amount the employer had paid to the employee-libellant for compensation and medical expenses under the Longshore Act and said fund had been created, pursuant to agreement of counsel for all parties (p. 39 of 138 F. (2d)—1st column), by an amount of money ($3,908.28) having been deducted from a $12,000 recovery against the shipowner by the injured longshoreman. This separation of funds was to enable the Court to determine the employer's claim to equitable subrogation. Further, the Court there, agreeing with the petitioner's contention as found at page 35 of its main brief, respecting the misconception of compensation payments as voluntary, said (p. 40 of 138 F. 2d):

> "No reasonable basis is present, therefore, for considering the employer's payments either as gratuitous or as voluntary, as the appellant would have us do."

Pp. 11 and 23: Porello argues that, since *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, allowed a federal em-

ployee to sue a third party so long as he has not accepted compensation under an award, the same principle should apply to a longshoreman. Of course, he misconceives the theme, purpose and application of the U. S. Employees Compensation Act, 5 U. S. C. A., § 751 et seq., as contrasted with that of the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A., § 901 et seq.

The two acts are not comparable at all. In the U. S. Employees Compensation Act, there is no provision for *election as to a third party* as is contained in the Longshore Act (33 U. S. C. A., § 933(a)). The only question of election in the U. S. Employees Compensation Act is as to the remedy the employee wishes to pursue *as against his employer*. In this connection, see *Militano* v. *United States*, 156 F. (2d) 599 (C. C. A. 2—1946) in comparison with *United States* v. *Marine*, 155 F. (2d) 456 (C. C. A. 4—1946). It is patent that comparison and similarity between the two Acts ceases at the very threshold of inquiry.

P. 21: The mere statement by Porello in paragraphs 2 and 3 at page 21 that the same insurance company, which insures the ship, insures the employer-stevedore is a classical example of *reductio ad absurdum*. Would there be any common sense to a ship, insured by one insurer, impleading a stevedore, insured by the same insurer? Would the petitioner herein have been impleaded in this suit if it were insured by the same insurer which insured the ship? It would be a situation of an insurer taking money out of its left pocket and putting the same in its right pocket. Resort need only be had to the many recent cases decided under *General Admiralty Rule 56* and *Federal Civil Rule 14*, as found in the annotations to those rules in *28 U. S. C. A., § 723*, to realize the folly of such a statement.

Further, Porello asserts at page 21 that an employer-stevedore does not bring actions against the ship for the

benefit of his employee. We respectfully refer this Court to *United States Fidelity & Guaranty Company for the Use of Itself and of Walsh* v. *United States*, 56 F. Supp. 452. The Circuit Court of Appeals, 2nd Circuit, affirmed the District Court in 152 F. (2d) 46, and held the right of subrogation to the cause of action against a third party to be vested in the compensation carrier as an incident to its contract of insurance (See 2nd column of p. 48 of 152 F. (2d)). The suit in the cited case was to recover full indemnity for Walsh's injuries (See p. 47 of 152 F. (2d)—2nd column).

It is respectfully submitted that nothing has been set forth in the brief of Porello which either detracts from or makes any inroads upon the contentions of this petitioner as set forth in its main brief.

As to the brief of the United States of America:

Pp. 11-17 inc.: The Government commendably states, page 16 of its brief, that

> "Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. *We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury.*" (Italics supplied.)

The Government, seemingly, thinks that an anomalous situation exists today, in that a person sustaining personal injuries caused by a public vessel would have to resort to suit under the Federal Tort Claims Act, whereas the property damage claimant could sue under the Public Vessels Act. If such an anomaly exists, it exists only in theory.

It is not found in the courtroom today. Let us see how such a dual case against the Government as owner of a public vessel would be handled today. For the hull damage caused to a private vessel by a public vessel, the owners of the former would sue under the Public Vessels Act on the admiralty side of the District Court, which would try the case without a jury. The personal injury claimants would sue in the same court under the Federal Tort Claims Act, Title IV of the Legislative Reorganization Act of 1946, Public Law 601, Chapter 753 of the Laws of the 79th Congress, 2nd Session. This action for personal injuries, as the admiralty action for property damage, would be triable without a jury (Sec. 410(a) of Part 3 of Federal Tort Claims Act). The same Court, without a jury, would determine the substantive rights of the parties to both actions.

If, indeed, an anomaly exists, which the petitioner herein denies, the anomaly was created by Congress, when it attempted to cure a defective situation, which it appreciated existed. Subsequent to the Public Vessels Act and prior to the Federal Tort Claims Act, Congress passed Special Acts to care for maritime torts of the personal injury type. (See page 5 hereof and footnote 11 of Government's brief). Congress appreciated that it was poorly equipped to handle these claims, along with others, through the medium of Special Acts which emanated from and burdened various Committees (Senate Report No. 1400, 79th Congress, 2nd Session, page 7, under caption "Saving Congressmen's Time"). The aforementioned Senate Report was submitted to the Senate on May 31, 1946 by the Special Committee of Reorganization of Congress (92 Cong. Rec. 6015—unbound advance sheet for May 31, 1946) to which committee Senate bill 2177 (Legislative Reorganization Act) had been referred upon its introduction on May 13, 1946 by Mr. La Follette (92 Cong. Rec. 498—unbound advance sheet for May 13, 1946).

The contemplated reorganization of Congress and its Committees was to do away in great part with Special Committees. At page 3 of S. Report 1400, *supra*, a table of the existing Special Committees and the contemplated reorganized Committees appears. The Committee on Claims was to be abolished. With the abolishment of the Committee on Claims, there would be eliminated a source of redress to which maritime tort claimants, along with others, had formerly resorted, discussed *supra*. The Legislative Reorganization Act abolished private bills, resolutions and amendments authorizing or directing the payment of money for property damage and for personal injuries (Cf. page 18 of S. Rep. No. 1400, *supra*; Sec. 131 Part 3 of Title I of Legislative Reorganization Act). In place of the time-honored device of the passage of private acts, the Federal Tort Claims Act was conceived and provides a method for the administrative and judicial adjustment of tort claims against the United States.

Thus, Congress, desirous of divorcing itself from the burden of enacting Special Acts to compensate personal injury claimants, including maritime tort claimants, enacted the Federal Tort Claims Act on August 2, 1946 (92 Cong. Rec. A 5251—unbound advance sheet for August 12, 1946). We think the foregoing answers the Government's fear of an existing anomaly.

The expression of the Government, heretofore set forth, in agreeing with the petitioner that the legislative history negatives coverage under the Public Vessels Act of personal injury claims, serves as an answer to Porello as to the Government's views upon the jurisdictional question presented.

Pp. 17-21 inc.; In limine, the Government states at page 17 that it has never joined in the petitioner's objection to jurisdiction based upon the provisions of the Longshore Act. We respectfully refer Court and counsel to Error 4 (R. 73) in the Government's Assignments of Error to the

Circuit Court of Appeals, 2nd Circuit, which reads as follows:

> "4. In ordering stricken from the answer of this respondent, the allegations with respect to the effect of the Longshoremen's and Harbor Worker's Compensation Act."

It would, therefore, appear that on appeal the Government assumed that it had raised in its answer the very defense which this petitioner raised in its answer (R. 16, 17) and as Error 1 in its Assignment of Error (R. 83). Its answer (R. 11) inadvertently did not raise the aforementioned defense.

In answer to the contention of the Government respecting the "suspension" of third party rights, we respectfully refer this Court to the statement of the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corp.*, found at pages 30 and 31 of petitioner's main brief.

Pp. 21-36 inc.: The United States reiterates the facts herein at pages 21 to 27 of its brief. The petitioner herein does not refute those facts. However, *upon these very facts*, the Circuit Court of Appeals said (R. 86, 87; 153 F. (2d) 607):

> "The District Judge found that the failure to have a lock on the strongback was negligent. *The evidence supports this finding.*" (Italics supplied.)

The Circuit Court of Appeals further said (R. 88; 153 F. (2d) 607):

> "In our opinion, the absence of the lock operated concurrently in producing the result."

In the face of these findings and holdings, which under the authorities are to be upheld unless clearly erroneous, the United States breached, at the very outset, its non-

delegable duty to furnish business invitees a safe place. *La Guerra* v. *Brasileiro*, 124 F. (2d) 553, cert. denied 315 U. S. 824; *Beadle* v. *Spencer*, 298 U. S. 124; *Grasso* v. *Lorenzen*, 149 F. (2d) 127, cert. denied 326 U. S. 743.

This Court recently held the warranty of seaworthiness to be extended to longshoremen in *Seas Shipping Co.* v. *Sieracki*, 66 S. Ct. 872. It therein said (p. 877 of 66 S. Ct.):

> "Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S., 1157; Carlisle Packing Co. v. Sandanger, supra. *It is a form of absolute duty owing to all within the range of its humanitarian policy.*" (Italics supplied.)

As was pointed out at page 41 of petitioner's main brief, the impleading petition (R. 14) alleged that the libelant's injuries were due "*solely* to the negligence, if any negligence be established, of American Stevedores Inc." It certainly was the understanding of the Government that the stevedore would be *responsible* where its negligence caused the injury complained of. In the instant case, the negligence of the United States and the petitioner concurred, *supra*. Responsibility for such a situation was not embraced in the understanding of the parties to the "Warshipsteve" contract.

Indeed, the Article of this "Warshipsteve" contract is nothing more than a *restatement of the law*, to wit, the stevedore will be liable for the injury it causes, not for the negligence of someone else. It is highly noteworthy that there is completely absent from this "Warshipsteve" contract the language of "indemnification and save harmless" found in the "Warshiprep" contract in use since 4/1/43. See *Compilation of Standard Contract Forms of the War Shipping Administration* (1945), p. 444 thereof.

At page 28, the Government states that stevedoring contracts *often* provide for indemnification of the shipowner by the stevedore and in support of that proposition, it cited in footnote 18 the *Kogusai* case, which we cited at page 40 of our main brief. There, *the contract provided that the stevedore indemnify the shipowner for damages "for which either or both of the parties hereto may or shall be liable"* (p. 404 of 23 F. Supp.—2nd column). No such provision is contained herein.

In footnote 20 the Government says petitioner's reference to the indemnity clause in the *Weldon* case, as being similar to that in the case at bar, is inaccurate. In the very same breath, it says "The clause there, while similar, etc. * * *".

At page 34, the Government says that the generally accepted principle that express language is necessary to embrace indemnification is the outmoded result of considerations of public policy in cases of common carriers. We simply refer the Government to cases at page 39 of petitioner's main brief as a complete answer to this incorrect premise.

Pp. 36-45 inc.: The Government discusses the common law theory of active and passive negligence. That rule has not been adopted in admiralty. The Government concedes this for it frankly states, page 45 of its brief, that it can find no admiralty decision to support its argument.

Pp. 45-50: The Government has treated the question of indemnity over under Rule 56 as an ancillary claim requiring no further jurisdictional prerequisites. The same is more clearly indicated in its footnote 31 at page 47 of its brief. It is to be noted that the cases cited and the rationale in support thereof is under the common law practice crystallized in *Federal Civil Rule 14.* There it has been held that, where a party is impleaded by virtue of a liability running to *the impleading party*, no independent

jurisdictional grounds are necessary and the impleaded claim is *ancillary* to the main proposition. Further, under *F. R. C. P. 14* at present writing, the original plaintiff can be tendered another defendant by way of impleader. (See contemplated change as expressed in the Report of Proposed Amendments prepared by the Advisory Committee on Rules for Civil Procedure, submitted to this Honorable Court on June 14, 1946—also, *Bull v. Santa Fe Trail Transp. Co.*, 6 F. R. D. 7.)

In contrast to this practice under the civil rules, it is to be noted that impleader in Admiralty is governed by *General Rule 56* which expressly provides that "such suit shall proceed as if such vessel or person had been originally proceeded against". As Porello, the employee of the petitioner herein could not proceed against the petitioner—his employer—directly, it became indispensable that separate and independent jurisdictional grounds in Admiralty support the impleading petition of the United States.

The decree appealed from, should be reversed with directions that a decree be entered dismissing the libel.

EDWARD ASH,
SIDNEY A. SCHWARTZ,
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IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted].

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

No. 996.

Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The subject matter of the case at bar is a simple negligence action with no federal question of substance involved.

Rosario Porello suffered a broken back on the 23rd day of September, 1942, while employed as a stevedore by the contracting stevedore, American Stevedores, Inc., aboard the Navy Transport, *Thomas Stone*, which was owned by the United States (R. 21a).

While stowing cargo in the #1 hold of the vessel, a strongback or thwart ship beam together with several

hatch covers fell striking Porello and causing him serious and permanent injuries (R. 120).

The plans of the vessel called for a locking device to hold the strongback in place, but the same being broken off or missing resulted in a beam falling and causing the accident (R. 121).

The Trial Court found that the United States of America was negligent in failing to provide a reasonably safe place wherein to work and that American Stevedores, Inc., were likewise negligent in that having full knowledge of the dangerous and defective condition, proceeded with the work without taking any means or precautions to remedy the dangerous condition (R. 95a, 96a).

The Trial Court having found that the contracting stevedore was guilty of fault, accordingly held that the Government was entitled to indemnification over in accordance with the terms of the contract of indemnity between it and said contracting stevedore (R. 97a).

The only questions, being issues of fact, the petition for a writ of certiorari should not be entertained by this Court.

POINT I.

The construction of the Public Vessels Act, 46 U. S. C. A., Sec. 781, is no longer the subject of review, as every feature thereof has been fully determined by this Court in the case of Canadian Aviator, Ltd. v. United States, 324 U. S. 215, decided February 26, 1945.

Petitioner has selected a minutia of the Public Vessels Act (46 U. S. C. A., Sec. 781), as the basis for granting a writ of certiorari to this Court.

After the exhaustive examination by this Court of the legislative history of the Public Vessels Act and the Congressional intent therefore and after rendering the en-

lightening, informative and instructive opinion which was a full and complete dissertation on the construction of every feature of said Act, so luculently expressed in the opinion in the recent case of *Canadian Aviator, Ltd.* v. *United States, supra,* it seems somewhat presumptuous to ask this Court to redeliberate this question.

This Court stated in the *Canadian Aviator, Ltd.* v. *United States* case, *supra,* that Congress intended to adopt the customary legal terminology of the Admiralty Law and consequently there seems no need for the United States Supreme Court to be called upon to tell the lower Admiralty Courts of this country what is meant by the word "damages" when applied to an admiralty tort.

The norm laid down by this Court seems reasonable enough, that a word should be given its customary legal terminology and it does not seem necessary to ask this Court to give the meaning of each and every word of an Act by a separate decision or opinion.

The petitioner has inadvertently stated that there is some doubt as to whether the word "damages" was intended by Congress to include personal injury claims.

The error of such statement becomes obvious when reference is made to Senator Bayard's explanation to the Senate on February 12, 1925, of the purpose of House Bill 9535 which became the Public Vessels Act, when he stated that the Act was for the purpose of giving

> *"a person aggrieved because of an accident by reason of the shortcoming of a United States ship the right to go into the district court and prosecute his action* • • •."

He stated this referred to

> "• • • *all maritime accidents of any kind* • • •."

Petitioner's reference to legislative history of the Act controverts its conclusion. Such reference establishes the fact that not until after the restrictions to:

1. "Property damage" (as stated by Mr. Underhill, Petitioner's Brief, p. 14) and

2. "Damage by collision",

were removed did Congress give favorable consideration to the bill, which subsequently became the Public Vessels Act.

It is difficult to see the relevancy of petitioner's reference set forth on pages 14 and 15 of its brief, as these Bills refer to:

a. Accidents ashore.

b. Compensation claims.

c. Appropriations by Congress where claims were settled without a law suit.

(The Bills set forth in the 2nd paragraph on page 15 of petitioner's brief, merely show that in order to obviate law suits, the claims of Edna M. Callahan and others for injuries suffered by an explosion aboard a Navy motor launch on October 10, 1932, were settled without putting the claimants to the expense or trouble of litigation. See letter of Claude A. Swanson, Secretary of Navy, dated September 1, 1933, submitted with Report #33, 75th Congress, 1st Session of House of Representatives, which accompanied H. R. 601.

Such appropriations were then necessary regardless of whether the claims were for personal injuries or property damage against the United States, and irrespective of whether the money was required to pay a judgment entered on a decree or a settlement agreed upon without litigation).

The fact that Congress was endeavoring to enact further legislation for protection of persons injured ashore, of persons in the Government employ, for *both* property damage and personal injury damage claims and the fact

that claims were settled by the Government without litigation throws no light on the intent of Congress in passing the Public Vessels Act.

Congress never was satisfied to enact special legislation for the protection of shipowners to the exclusion of persons suffering personal injury.

Many of our Congressmen objected to special privilege being extended to shipowners and operators to the exclusion of personal injury claimants and others, as shown by the following (p. 43 of the Report of the Hearings of the 66th Congress, 3rd Session, Feb. 7, 1921, Report No. 1301 of the House of Representatives):

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."

(p. 44 of the same Report):

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

Mr. Upshaw said, at 66 Cong. Rec. 2087:

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason of their being run over by Government trucks, and things of that kind. Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?"

Mr. Underhill replied:

> "* * * I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong,' will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

Such bills were not acceptable to Congress.

Finally, the restriction limiting suits in admiralty by owners of vessels was stricken out.

The restriction limiting the causes of action to property damage resulting from collision was stricken out.

In place thereof, House Bill 9535 was submitted which provided:

> *"That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States,* * * *"*

This bill was passed by Congress and became law, Mar. 3, 1925, c. 428, Sec. 1, 43 Stat. 112, 46 U. S. C. A., Secs. 781 to 790, commonly known as *Public Vessels Act*.

The effect of this Act was to eliminate the defense of sovereign immunity and to extend the rights provided by the Act of Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525, 46 U. S. C. A., Secs. 741 to 752, commonly known as *Suits in Admiralty Act*.

The effect of the Public Vessels Act was to remove the defense of sovereign immunity, where a public vessel was involved, so that the rights provided by the Suits in Admiralty Act, to a personal injury claimant, would not be limited only to merchant vessels of the United States, but would be extended to public vessels as well. See:

> *State of Maine* v. *U. S. D. C.*, Me. 1942, 45 F. Supp. 35.

Both Acts are to be considered in *pari materia*".

The Second Circuit Court of Appeals in the case of *U. S.* v. *Caffey, Judge, et al.*, 141 Fed. (2d) 69, on page 70, stated in no uncertain terms that the two statutes are to be construed together.

The aforesaid case was an appeal of Judge Caffey's decision in the case of *Aguilines Inc.* v. *U. S. A.*, 1943 A. M. C. 715, where on page 717, Judge Caffey stated as follows:

> "• • • The two statutes are in *pari materia* (*State of Maine* v. *U. S.*, 1942 A. M. C. 1075, 45 Fed. Supp. 35, 37)."

This Court in its opinion in the *Canadian Aviator Ltd.* case, *supra*, discusses the cases of *Dobson* v. *United States*, 1928 A. M. C. 1583, 27 F. (2d) 807, and *O'Neal* v. *United States*, 1925 A. M. C. 1325, 11 F. (2d) 869, points out that both Dobson and O'Neal were of the personnel of his respective vessel and *for that reason only*, the actions could not be maintained under the Public Vessels

Act. The logical meaning therefore, is that if Dobson and O'Neal had not been members of the personnel of his respective vessel, he would have been entitled to maintain the action under the Public Vessels Act.

Robinson on Admiralty, 1939 Edition, states on page 267, speaking of the Public Vessels Act:

> "From this outline of the act it is to be seen that the United States has accepted liability for its public vessels and gives up, in its own courts, by a standing waiver, its exemption under the sovereign immunity."

Under this Act, libelant has the same rights as he would have had against the Government were the vessel involved a merchant vessel belonging to the United States.

In the *Wright* case, C. C. A. N. Y. 1940, 109 F. (2d) 699, on page 701, the court stated:

> "Whatever may have been the previous rule under *The Thekla* (266 U. S. 328), *supra*, we think with the court below that the Public Vessels Act applied to all claims against the United States for damages caused by public vessels * * *."

POINT II.

This Court will review matters involving conflicts of decisions between Circuit Courts of Appeals, but not involving conflicts of decisions between Federal District Courts, Rule 38, Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, effective February 27, 1939. Amended March 25, 1940, October 21, 1940 and May 26, 1941.

However, the fact is that the decisions by the District Courts are uniform and in accordance with the uniform decisions of the Circuit Courts and the Court of Appeals of the Supreme Court of the State of New York, on the question of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Secs. 190, et seq.

The Circuit Courts are not only in accord with each other but in accord with local decisions. See:

The Etna, 138 Fed. (2d) 37 (C. C. A. 3rd C.);
Grasso v. *Lorentzen*, 149 Fed. (2d) 127 (C. C. A. 2nd C.) c. d.: Dec. 8, 1945;
Ricciardi v. *American Export Lines*, 294 N. Y. 812.

Petitioner charges the District Courts with heterogamous decisions. The following will demonstrate beyond the peradventure of a doubt that they are orthogamous.

Congress has clearly stated the essential prerequisite necessary to bar a third party action.

Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b).

The report of an informal conference by a claims examiner does not have the legal effect of an award by a deputy commissioner.

A claims examiner's function is never to make any finding, but solely and exclusively to aid a claimant and the employer or carrier to amicably adjust their differences, to narrow the issues and to simplify the method of proof.

See:

Code of Federal Regulations, 1941 Supp. Title 20, page 1873, under sub-division (b).

After the informal conferences have been terminated, the parties may stipulate as to agreed facts, and subdivision (d), provides the method for so stipulating in order that the stipulation may become effective.

See: *Subdivision (d)*

"Such stipulations when signed by the parties in interest shall become part of the record of the case."

The claims examiner cannot substitute for the deputy commissioner, for even one deputy commissioner may not substitute for another without the consent of the commission.

See:

U. S. C. A., Title 33, Section 919, sub-division (g).

Under *Section 919, sub-division (e)*, provision is made as to who should make the award, and it is specifically provided that the award must be made by the deputy commissioner.

Section 921 (a), provides as follows:

"A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this chapter."

Section 919, sub-division (c), provides:

> "• • • the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

Insofar as the law provides who should make the award, what constitutes an award and when an award shall take effect, it remains no debatable question.

An award can be made only by a deputy commissioner, and can only become effective if made in accordance with Section 919 of the U. S. C. A. 33.

In the case of: *The Etna*, Circuit Court of Appeals, 3rd Circuit, decided September 9, 1943, 138 F. (2d) 37, on page 41, the court stated in speaking of U. S. C. A. 33, Section 933, sub-division (b):

> "This calls for the deputy commissioner's affirmative action which, together with its known legal consequences, engages his supervision on the basis of the employer's liability for compensation under the Act."

It is obvious that there is quite a distinction between voluntary payments as made in the case at bar, and payments accepted under an award as contemplated by the amendment of 1938, *supra*.

In *The Etna* case, *supra*, the court further stated on page 41, in speaking of Section 914 (a):

> "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

It is obvious that the Circuit Court recognized the distinction between compensation paid, as in the case at

bar, without an award, and compensation paid under an award by a deputy commissioner.

In the case of *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, it was found as a question of fact that a deputy commissioner had made an award.

The court said as follows:

> "• • • we think that the compensation was accepted 'under an award in a compensation order filed by the deputy commissioner'. The master reported that the deputy commissioner noted in his records the disposition he had made of the plaintiff's claim for compensation."

Proof was taken by the deputy commissioner.

A written finding was made by the deputy commissioner, and the deputy commissioner recorded the award in his notes.

The deputy commissioner notified all parties concerned as to his award.

The claimant accepted payments under such award.

All of the District Court Judges who have dealt with this question have held that the acceptance of compensation, not accepted under an award by a Deputy Commissioner, is no bar to a third party action.

In the case of *Sessa* v. *Weeks Stevedoring Co.*, 56 F. Supp. 50, Judge Moscowitz held that a filed written report of a claims examiner is not an award under the Act.

He stated in part as follows:

> "It will be noted that Sec. 933 (b) requires that the award in compensation order be made by the Deputy Commissioner.
>
> In the Circuit Court of Appeals for this Circuit in the case of *Toomey* v. *Waterman*, 1942, A. M. C., Page 90 (decision filed Nov. 24, 1941), it was held

that the requirements of this section are met if the Deputy Commissioner makes a note in his records of the disposition that he has made of the plaintiff's claim for compensation, and that, under those circumstances, though the act was informal, it was equivalent to an order and satisfied the provisions of the amendment."

In the case of *Brusich* v. *Grace Line*, 56 F. Supp. 48, the claimant went so far as to settle his claim for $1,000.00 at a hearing before a claims examiner, and Judge Caffey held that he was not barred from proceeding with his third party action, the Court holding in part as follows:

"The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person is definitely provided in subdivision (b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner'. It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal conformity with the statute, to the employer."

To the same effect see:

Iaria v. *Silver Line*, 56 F. Supp. 42, Judge Mandelbaum;

Cupo v. *Isthmian S.S. Co.*, 56 F. Supp. 45, Judge Leibell;

Tartaglio v. *Cunard White Star*, 56 F. Supp. 55, Judge Rifkind;

Pugliese v. *Panama Transport Co.*, Judge Coxe, 1944 A. M. C. 1101;

Barry v. *Barber S.S. Lines*, Jan. 27, 1944, civil 22-553, Judge Leibell (not reported);
Brusich v. *Grace Line Inc.*, *supra*, Judge Caffey;
Sessa v. *Weeks Stevedoring Co.*, *supra*, Judge Moskowitz.

In *Bellantuono* v. *American Export Lines, Inc.*, 1944 A. M. C. 437, where it is asserted that Judge Clancy held to the contrary, that is not so. Judge Clancy merely refused to strike out the answer as a matter of law and left the question for the Trial Court. The case being settled for approximately $12,000.00 during the trial, the question was never decided.

The Court's attention is respectfully called to two letters which are on file as Exhibits in the *Brusich* case, which show the view of the Deputy Commissioner as well as Chief Counsel for the United States Employees' Compensation Commission, which letters are submitted for such consideration as this Court may see fit to give to them.

The letters are as follows:

Official Correspondence Should Be Addressed to the Deputy Commissioner

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

DISTRICT No 2

641 Washington Street, at Christopher

New York City 14

Commissioners

JEWELL W. SWOFFORD
Chairman
JOHN J. KEEGAN
ALBERT H. LADNER, JR.

SAMUEL S. LOWE
Deputy Commissioner

In reply refer to File No. .....

June 3rd, 1943

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Sir:

I have your letter of June 3, 1943 inquiring as to whether a claims examiner's memorandum of conference constitutes an award by the Deputy Commissioner in this Commission, and as to whether a finding by the claims examiner is binding on the Commissioner, the insurance carrier, or the claimant.

Conferences to consider claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act are in the first instance held by a claims examiner.

This is an informal procedure, in the nature of a general discussion of the merits of the case, there is no testimony taken under oath, and the general purpose of the procedure is to expedite payment and adjustment of the claim and where possible, disposition by agreement of the parties in interest. At its conclusion, the claims examiner files a "memorandum of conference" copies of which are supplied all interested parties. It is supposed to detail the essential facts in connection with the claim, and to conclude with his recommendation in regard to payment or further indicated course of action.

In reply to your question as to whether such a memorandum can be said to be the equivalent of a finding by the Deputy Commissioner, you are advised that the Commission believes that the compensation order contemplated by the Act requires the approval and signature of the Deputy Commissioner. When such an Order is filed, it becomes binding upon the parties in interest and subject to review on questions of law by the Federal Courts within the statutory period. Memoranda of conferences are not regarded as binding upon the parties in interest and the insurance carrier may decline to comply with the recommendation of the claims examiner, the claimant may decline to accept the recommendation, and both parties retain their rights under the law to a formal hearing before the Deputy Commissioner.

Very truly yours,

SAMUEL S. LOWE,
SAMUEL S. LOWE,
Deputy Commissioner.

SSL:MB

Official Correspondence Should Be Addressed to the Commission

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York, 17, New York

Commissioners

JEWELL W. SWOFFORD
Chairman
JOHN M. MORIN
JOHN J. KEEGAN

WM. MCCAULEY
Secretary

In reply refer to File No. .....

December 18, 1943.

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Mr. Rassner:

In response to your inquiry by telephone as to the time when an election to take compensation under the Longshoremen's and Harbor Workers' Compensation Act becomes effective for the purpose of giving to an employer, by assignment under section 33 (b) of that Act, the employee's right of action against a third party, you are advised that section 33 (b) clearly states the time in the following language: "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

The purpose of the 1938 amendment to section 33 (b) in this respect is too clear for argument, as may be observed by reading the comments of the Senate Judiciary

Committee, which reported the Bill, H. R. 5690 (see Senate Report No. 1988, Calendar No. 2100, 75th Congress, 3rd Session, page 9).

Section 33 (a) of the Longshoremen's Act provides for an election (1) to take compensation, or (2) to sue the third party. Notice of election *to sue* is provided for by form US-213. Notice of election to accept compensation is not required to be given by any special form, but the filing of a claim by an employee (Form US-203) indicates the employee's purpose and intention to claim compensation; and if pursuit of the claim to the point of a formal award in a compensation order, the *claim* plus the *formal award* completes the setting for assignment to operate under section 33 (b). In view of the language of section 33 (b) and the legislative history of the 1938 amendment to this section, it could hardly be validly asserted that assignment to the employer takes place any earlier than the date of acceptance of compensation under a compensation order. An employee who files a claim, and before accepting compensation under an award, may desire to sue the third party. He would apparently have the right under the statute to exercise his third party remedy even though he had filed claim, provided he did not accept compensation under a formal award as the statute provides. The mere filing of the claim shows *prima facie* that the employee desires to pursue the compensation remedy, but, according to the statute he does not lose his right to sue the third party *until* he accepts compensation in the matter indicated. Stated otherwise, while filing of claim indicates a desire to claim compensation, the election (for purposes of working the assignment) does not become effective until compensation is accepted under an award.

Very truly yours,

W. E. Boote,
W. E. Boote,
Chief Counsel.
HPM

All of the State Court cases which held to the contrary were based on the decision in the case of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859), however, on January 2, 1945, the Appellate Division of the Second Department, which had decided the *Jakuboski* case, reversed itself in the case of *Ricciardi, appellant* v. *American Export Lines, Inc., respondent, supra,* as follows:

> "We believe that subdivisions (a) and (b) should be read as one continuous, integrated enactment. Thus read, there is required the holding that the acceptance of compensation which was paid without an award did not constitute an election by the plaintiff to accept compensation rather than to sue a third party (*Tartaglio* v. *Cunard White Star, Lim.*, 56 Fed. Supp. 55; *Pugliese* v. *Panama Transport Co.*, opinion by Judge Coxe in the U. S. District Court for the Southern District of New York, October 5, 1943, not officially reported; *Brusich* v. *Grace Line, Inc.*, 56 Fed. Supp. 48; *Cupo* v. *Isthmian S.S. Co. Inc.*, 56 Fed. Supp. 45; Report No. 1945, House of Representatives, 75th Congress, Third Session, entitled 'Amending the Longshoremen's and Harbor Workers' Compensation Act', dated March 14, 1938).
>
> This decision is not in harmony with our holding in the two cases of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859). When those cases were decided the legislative purpose and intention in amending the act in 1938, as expressed in the report to the House of Representatives and the uniform holdings of the federal courts interpreting the act as amended were not called to our attention. Such legislative expression and federal court interpretation of this federal act

make imperative retraction of our holding in the *Jakuboski* cases."

In the *Etna* case, *supra*, the Court laid down the principle that an employer is entitled to reimbursement for compensation paid to a claimant and a claimant may not have a double recovery.

As to the equities in the case, the realistic fact is that usually, the same insurance company which insures the ship, insures the employer and consequently the provision, that an employer may sue a third party to the benefit of the claimant, has no practical application of value.

In addition to the foregoing, an employer receiving lucrative contracts from a ship does not bring actions against the ship for benefit of his employee.

The fact is that a longshoreman receives but $20.00 a week to a maximum recovery of $7,500.00, regardless of the fact that he may have lost his limbs or been crippled for life or otherwise seriously and permanently incapacitated.

It is for these reasons that Congress in 1938 saw fit to amend the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. A., Secs. 901, *et seq.* by adding subdivision (b) requiring the acceptance of compensation under an award in a compensation order filed by a deputy commissioner, in order to bar a longshoreman from his right to proceed with a third party action.

POINT III.

A disputed question of fact decided by an Admiralty Court is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison*, 114 Fed. (2d) 400, on page 405:

"The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless*, 238 U. S. 264;
Hyde v. *U. S.*, 225 U. S. 347;
Mattox v. *U. S.*, 146 U. S. 140;
8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff.;
Sunderland, Verdicts General and Special 29 Yale L. J. 253 (1919).

The "Warshipsteve" agreement is not a Federal Statute. It is a contract, nor more, no less.

The fact that the United States of America is a party to it does not impose the duty on the United States Supreme Court to act as a trial tribunal and determine questions of fact, contractual intent, meeting of the minds or credibility of witnesses.

These are all matters for our Trial Courts.

The very authorities cited by petitioner establishes the fact that similar contracts were interpreted as factual questions.

All the authorities cited by petitioner fall within one or more of the following categories:

(a) The intent of the parties.

(b) The question of maintenance and control of the vessel.

(c) The sufficiency of the proof to sustain a contract of indemnity.

The case of *Shamrock Towing Co.* v. *City of New York*, 16 Fed. (2d) 199 (C. C. A. 2), is not in point as there, both parties were chargeable for the damages by

their joint torts, whereas in the case at bar the contract provided that if the contracting stevedore contributed to an accident, the Government was entitled to indemnification regardless of its fault.

The only question in the case at bar between two joint tort feasors was the right to indemnification which was clearly an issue of fact decided on conflicting evidence and consequently is not a proper subject of review by this Court.

The question of contribution is not in this ca[illegible] as there was no common liability upon the tort feasor to the injured party, A. L. I. Restitution sec. 86; 13 Am. Jur., contribution sec. 51 as libellant had no cause of action against his employer.

See

Consolidated Coach Corp. v. *Burge*, 245 Ky. 631, 54 S. W. 2d 16, 85 A. L. R. 1086;
Walker-Kroger Grocery & Baking Co., 214 Wis. 519, 252 N. W. 721, 92 A. L. R. 680.

POINT IV.

There Is No Jurisdictional Question Involved.

The question of jurisdiction cannot be validly raised as jurisdiction could rest on the fact that the indemnitee is the United States, 28 U. S. C., Sec. 41 (subd. 1) see *Tuthill* v. *United States*, 38 F. 538 (N. D. Ill.), appeal dismissed 136 U. S. 652, aside from the fact that the action was predicated upon admiralty tort and that the said admiralty tort was the subject matter of the contract of indemnity between the two joint tort feasors.

CONCLUSION.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

JACOB RASSNER,
Proctor for Respondent,
Rosario Porello.

GEORGE J. ENGELMAN,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1946.

No. 69.

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

Brief on Behalf of Respondent, Rosario Porello, on Writ of Certiorari to the United State Circuit Court of Appeals for the Second Circuit.

JACOB RASSNER,
Proctor for Respondent,
Rosario Porello.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0639

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

AMERICAN STEVEDORES, INC., *Petitioner,* v. ROSARIO PORELLO, AND UNITED STATES OF AMERICA, *Respondents.*	No. 69.

Brief on Behalf of Respondent, Rosario Porello, on Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The respondent, Rosario Porello, is concerned solely with the question as to his right to maintain an action for damages as a result of personal injuries caused by the Government's vessel, and accordingly is confining his brief to the Assignments of Errors designated 1 and 2.

The Assignments of Errors designated 3, 4 and 5 raise questions as to the rights between the petitioner and the respondent, United States of America, in which the respondent, Rosario Porello, is not concerned.

The question of the right of the respondent, Rosario Porello to sue the respondent, United States of America, has not been raised before this Court by the United States of America, but has been raised by the petitioner, Ameri-

can Stevedores, Inc., who was interpleaded in the District Court action by the United States of America.

Statement of the Case.

Rosario Porello suffered a broken back on the 23rd day of September, 1942, while employed as a stevedore by the contracting stevedore, American Stevedores, Inc., aboard the Navy Transport, *Thomas Stone*, which was owned and operated by the United States (R. 21a).

While stowing general cargo in the #1 hold of the vessel, a strongback or thwart ship beam, together with several hatch covers fell striking Porello and causing him serious and permanent injuries (R. 120).

The plans of the vessel called for a locking device to hold the strongback in place, but the same being broken off or missing resulted in a beam falling and causing the accident (R. 121).

The Circuit Court of Appeals for the Second Circuit affirmed the Trial Court's finding that Rosario Porello was entitled to recover damages from the respondent, United States of America for injuries caused by the vessel.

The respondent, United States of America, has not asked this Court to review the holding by the Lower Court that Rosario Porello was entitled to maintain an action for damages for personal injuries against the United States of America.

The petitioner, which was interpleaded by the respondent, United States of America in the District Court below, is the one, which raises the question, as to whether Rosario Porello might maintain an action, against the owner and operator of the vessel. The question is not raised in this Court by the ship's owner and operator, the United States of America.

POINT I.

This Court has decided in the case of Canadian Aviator, Ltd. v. United States, 324 U. S. 215, decided February 26, 1945, that under the Public Vessels Act of 1925, the United States has consented to be sued for damages for personal injuries or wrongful death.

The construction of the Public Vessels Act, 46 U. S. C. A., Sec. 781, is no longer the subject of review, as every feature thereof has been fully determined by this Court in the case of *Canadian Aviator, Ltd.* v. *United States, supra.*

After the exhaustive examination by this Court of the legislative history of the Public Vessels Act and the Congressional intent therefore and after rendering the enlightening, informative and instructive opinion which was a full and complete dissertation on the construction of every feature of said Act, so lucculently expressed in the opinion in the recent case of *Canadian Aviator, Ltd.* v. *United States, supra*, it seems somewhat presumptuous to ask this Court to redeliberate this question.

This Court stated in the *Canadian Aviator, Ltd.* v. *United States* case, *supra*, that Congress intended to adopt the customary legal terminology of the Admiralty Law and consequently there seems no need for the United States Supreme Court to be called upon to tell the lower Admiralty Courts of this country what is meant by the word "damages" when applied to an admiralty tort.

The norm laid down by this Court seems reasonable enough, that a word should be given its customary legal terminology and it does not seem necessary to ask this Court to give the meaning of each and every word of an Act by a separate decision or opinion, in each and every action against the Government.

The petitioner urges that this Court in construing the word "damages" as used by Congress, should limit the meaning thereof to "property damage claims" instead of "all claims", as specifically expressed by Congress.

The error of such contention becomes obvious when reference is made to Senator Bayard's explanation to the Senate on February 12, 1925, of the purpose of House Bill 9535 which became the Public Vessels Act, when he stated that the Act was for the purpose of giving

> *"a person aggrieved because of an accident by reason of the shortcoming of a United States ship the right to go into the district court and prosecute his action * * *."*

He stated this referred to

> *"* * * all maritime accidents of any kind * * *."*

Petitioner's reference to legislative history of the Act controverts its conclusion. Such reference establishes the fact that not until after the restrictions to:

1. "Property damage" and
2. "Damage by collision",

were removed did Congress give favorable consideration to the bill, which subsequently became the Public Vessels Act.

The fact that Congress saw fit to pass Acts for the relief of Edna M. Callahan and others referred to on pages 22 and 23 of petitioner's brief, for injuries suffered aboard a Navy motor launch on October 10, 1932, without putting the claimants to the expense and trouble of litigation or filing claims with the Court of Claims, does not indicate that these people could not have maintained actions against the Government. See letter of Claude A.

Swanson, Secretary of Navy, dated September 1, 1933, submitted with Report #33, 75th Congress, 1st Session of House of Representatives, which accompanied H. R. 601.

Such appropriations were then necessary regardless of whether the claims were for personal injuries or property damage against the United States, and irrespective of whether the money was required to pay a judgment entered on a decree or a settlement agreed upon without litigation.

The fact that the Secretary of Navy was authorized to settle property damage claims for limited amounts as stated by petitioner on page 10 of its brief, or the Secretary of War to settle claims for limited amounts for damages caused by non-combat activities of the army, as stated on page 24 of petitioner's brief, does not mean that the provisions of the Public Vessels Act were eliminated, but merely means that Congress was endeavoring to avoid as much litigation and claims, with the Court of Claims, as possible, particularly for small amounts.

It would be unconscionable to think that Congress intended to deprive a class of persons suffering major damage, from any relief, when it was granting relief to persons, suffering minor damages.

The fact that Congress was endeavoring to enact further legislation for protection of persons injured ashore, of persons in the Government employ, for *both* property damage and personal injury damage claims and the fact that claims were settled by the Government without litigation does not alter the intent of Congress in passing the Public Vessels Act, to afford redress for all maritime accidents, as heretofore pointed out in the explanation by Senator Bayard to the Senate on February 12, 1925, of the purposes of House Bill 9535, which became the Public Vessels Act.

Congress never was satisfied to enact special legislation for the protection of shipowners to the exclusion of persons suffering personal injury.

Many of our Congressmen objected to special privileges being extended to shipowners and operators to the exclusion of personal injury claimants and others, as shown by the following (p. 43 of the Report of the Hearings of the 66th Congress, 3rd Session, Feb. 7, 1921, Report No. 1301 of the House of Representatives):

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."

(p. 44 of the same Report):

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

Mr. Upshaw said, at 66 Cong. Rec. 2087:

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason

of their being run over by Government trucks, and things of that kind. Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?"

Mr. Underhill replied:

"* * * I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong,' will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

Such bills were *not acceptable* to Congress.

Finally, the restriction limiting suits in admiralty by owners of vessels was stricken out.

The restriction *limiting the causes of action to property damage* resulting from collision *was stricken out.*

In place thereof, House Bill 9535 was submitted which provided:

*"That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, * * *"*

This bill was passed by Congress and became law, Mar. 3, 1925, c. 428, Sec. 1, 43 Stat. 112, 46 U. S. C. A., Secs. 781 to 790, commonly known as *Public Vessels Act.*

The effect of this Act was to eliminate the defense of sovereign immunity and to extend the rights provided by the Act of Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525, 46 U. S. C. A., Secs. 741 to 752, commonly known as *Suits in Admiralty Act.*

The effect of the Public Vessels Act was to remove the defense of sovereign immunity, where a public vessel was involved, so that the rights provided by the Suits in Admiralty Act, to a personal injury claimant, would not be limited only to merchant vessels of the United States, but would be extended to public vessels as well. See:

State of Maine v. *U. S. D. C.*, Me. 1942, 45 F. Supp. 35.

Both Acts are to be considered in *pari materia*.

The Second Circuit Court of Appeals in the case of *U. S.* v. *Caffey, Judge, et al.*, 141 Fed. (2d) 69, on page 70, stated in no uncertain terms that the two statutes are to be construed together.

The aforesaid case was an appeal of Judge Caffey's decision in the case of *Agwilines Inc.* v. *U. S. A.*, 1943 A. M. C. 715, where on page 717, Judge Caffey stated as follows:

> "• • • The two statutes are in *pari materia* (*State of Maine* v. *U. S.*, 1942 A. M. C. 1075, 45 Fed. Supp. 35, 37)."

This Court in its opinion in the *Canadian Aviator Ltd.* case, *supra*, discusses the cases of *Dobson* v. *United States*, 1928 A. M. C. 1583, 27 F. (2d) 807, and *O'Neal* v. *United States*, 1925 A. M. C. 1325, 11 F. (2d) 869, points out that both Dobson and O'Neal were of the personnel of his respective vessel and *for that reason only*, the actions could not be maintained under the Public Vessels Act. The logical meaning therefore, is that if Dobson and O'Neal had not been members of the personnel of his respective vessel, he would have been entitled to maintain the action under the Public Vessels Act.

Robinson on Admiralty, 1939 Edition, states on page 267, speaking of the Public Vessels Act:

> "From this outline of the act it is to be seen that the United States has accepted liability for its public vessels and gives up, in its own courts, by a standing waiver, its exemption under the sovereign immunity."

Under this Act, libelant has the same rights as he would have had against the Government were the vessel involved a merchant vessel belonging to the United States.

In the *Wright* case, C. C. A. N. Y. 1940, 109 F. (2d) 699, on page 701, the court stated:

> "Whatever may have been the previous rule under *The Thekla* (266 U. S. 328), *supra*, we think with the court below that the Public Vessels Act applied to all claims against the United States for damages caused by public vessels * * *"

Incidentally, the vessel in question was not a war vessel, but one carrying general cargo and for all intents and purposes was engaged as any commercial mercantile vessel in the transportation of passengers and cargo.

It is interesting to note that the Government has not asked this Court to review the decision of the lower Court, which held that an action against it might be maintained by Rosario Porello.

POINT II.

Congress has stated that only by accepting compensation under an award by a Deputy Commissioner, may a longshoreman be barred from a third party action, and is not barred when he accepts benefits without an award. Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b).

This Court held that acceptance of voluntary payments did not constitute a bar to a third party action in the case of Brady v. Roosevelt S. S. Co., 317 U. S. 575.

Congress has clearly stated the essential prerequisite necessary to bar a third party action.

> *Navigation and Navigable Waters Act*, Title 33, Sec. 933, U. S. C. A. Sub. (b).

The Circuit Court of Appeals for the Second Circuit, the Circuit Court of Appeals for the Third Circuit, the Supreme Court of the State of New York, and all the District Courts which have passed on this question, have uniformly held, that a longshoreman is not barred from maintaining a third party action, so long as he has not accepted compensation, under an award by a deputy commissioner of the United States Compensation Commission. See:

> *Grasso* v. *Lorentzen*, 149 Fed. (2d) 127 (C. C. A. 2nd C.) cd. Dec. 8, 1945;
> *The Etna*, 138 Fed. (2d) 37 (C. C. A. 3rd C.);
> *Ricciardi* v. *American Export Lines*, 294 N. Y. 812;
> *Iaria* v. *Silver Line*, 56 F. Supp. 42, Judge Mandelbaum;
> *Cupo* v. *Isthmian S.S. Co.*, 56 F. Supp. 45, Judge Leibell;
> *Tartaglio* v. *Cunard White Star*, 56 F. Supp. 55, Judge Rifkind;

Pugliese v. *Panama Transport Co.*, Judge Coxe, 1944 A. M. C. 1101;

Barry v. *Barber S.S. Lines*, Jan. 27, 1944, civil 22-553, Judge Leibell (not reported);

Brusich v. *Grace Line Inc.*, 56 F. Supp. 48, Judge Caffey;

Sessa v. *Weeks Stevedoring Co.*, 56 F. Supp. 50, Judge Moscowitz.

The United States Supreme Court has held in the case of *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575 (N. Y. 1943), that a federal employee injured aboard a vessel, is not barred from maintaining a third party suit so long as he has not accepted compensation under a final award.

The report of an informal conference by a claims examiner does not have the legal effect of an award by a deputy commissioner.

A claims examiner's function is never to make any finding, but solely and exclusively to aid a claimant and the employer or carrier to amicably adjust their differences, to narrow the issues and to simplify the method of proof.

See:

Code of Federal Regulations, 1941 Supp. Title 20, page 1873, under sub-division (b).

After the informal conferences have been terminated, the parties may stipulate as to agreed facts, and subdivision (d), provides the method for so stipulating in order that the stipulation may become effective.

See: *Subdivision (d)*

"Such stipulations when signed by the parties in interest shall become part of the record of the case."

The claims examiner cannot substitute for the deputy commissioner, for even one deputy commissioner may not substitute for another without the consent of the commission.

See:

U. S. C. A., Title 33, Section 919, sub-division (g).

Under *Section 919, sub-division* (*c*), provision is made as to who should make the award, and it is specifically provided that the award must be made by the deputy commissioner.

Section 921 (*a*), provides as follows:

> "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this chapter."

Section 919, sub-division (*c*), provides:

> "* * * the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

Insofar as the law provides who should make the award, what constitutes an award and when an award shall take effect, it remains no debatable question.

An award can be made only by a deputy commissioner, and can only become effective if made in accordance with Section 919 of the U. S. C. A. 33.

In the case of: *The Etna*, Circuit Court of Appeals, 3rd Circuit, decided September 9, 1943, 138 F. (2d) 37, on page 41, the court stated in speaking of U. S. C. A. 33, Section 933, sub-division (b):

> "This calls for the deputy commissioner's affirmative action which, together with its known legal

consequences, engages his supervision on the basis of the employer's liability for compensation under the Act."

It is obvious that there is quite a distinction between voluntary payments as made in the case at bar, and payments accepted under an award as contemplated by the amendment of 1938, *supra*.

In *The Etna* case, *supra*, the court further stated on page 41, in speaking of Section 914 (a):

> "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

It is obvious that the Circuit Court recognized the distinction between compensation paid, as in the case at bar, without an award, and compensation paid under an award by a deputy commissioner.

In the case of *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, it was found as a question of fact that a deputy commissioner had made an award.

The court said as follows:

> "* * * we think that the compensation was accepted 'under an award in a compensation order filed by the deputy commissioner'. The master reported that the deputy commissioner noted in his records the disposition he had made of the plaintiff's claim for compensation."

Proof was taken by the deputy commissioner.

A written finding was made by the deputy commissioner, and the deputy commissioner recorded the award in his notes.

The deputy commissioner notified all parties concerned as to his award.

The claimant accepted payments under such award.

All of the District Court Judges who have dealt with this question have held that the acceptance of compensation, not accepted under an award by a Deputy Commissioner, is no bar to a third party action.

In the case of *Sessa* v. *Weeks Stevedoring Co., supra,* the Court held that a filed written report of a claims examiner is not an award under the Act.

He stated in part as follows:

> "It will be noted that Sec. 933 (b) requires that the award in compensation order be made by the Deputy Commissioner.
>
> In the Circuit Court of Appeals for this Circuit in the case of *Toomey* v. *Waterman,* 1942, A. M. C. Page 90 (decision filed Nov. 24, 1941), it was held that the requirements of this section are met if the Deputy Commissioner makes a note in his records of the disposition that he has made of the plaintiff's claim for compensation, and that, under those circumstances, though the act was informal, it was equivalent to an order and satisfied the provisions of the amendment."

In the case of *Brusich* v. *Grace Line, supra,* the claimant went so far as to settle his claim for $1,000.00 at a hearing before a claims examiner, and Judge Caffey held that he was not barred from proceeding with his third party action, the Court holding in part as follows:

> "The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person is definitely provided in subdivision

(b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner'. It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal conformity with the statute, to the employer."

In *Bellantuono* v. *American Export Lines, Inc.*, 1944 A. M. C. 437, where it is asserted that Judge Clancy held to the contrary, that is not so. Judge Clancy merely refused to strike out the answer as a matter of law and left the question for the Trial Court. The case being settled for approximately $12.000.00 during the trial, the question was never decided.

The Court's attention is respectfully called to two letters which are on file as Exhibits in the *Brusich* case, which show the view of the Deputy Commissioner as well as Chief Counsel for the United States Employees' Compensation Commission, which letters are submitted for such consideration as this Court may see fit to give to them.

The letters are as follows:

Official Correspondence Should Be Addressed to the Deputy Commissioner

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

DISTRICT No. 2

641 Washington Street, at Christopher

New York City 14

Commissioners

JEWELL W. SWOFFORD
Chairman

JOHN J. KEEGAN

ALBERT H. LADNER, JR.

SAMUEL S. LOWE
Deputy Commissioner

In reply refer to File No. .....

June 3rd, 1943

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Sir:

I have your letter of June 3, 1943 inquiring as to whether a claims examiner's memorandum of conference constitutes an award by the Deputy Commissioner in this Commission, and as to whether a finding by the claims examiner is binding on the Commissioner, the insurance carrier, or the claimant.

Conferences to consider claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act are in the first instance held by a claims examiner. This is an informal procedure, in the nature of a general discussion of the merits of the case, there is no testimony

taken under oath, and the general purpose of the procedure is to expedite payment and adjustment of the claim and where possible, disposition by agreement of the parties in interest. At its conclusion, the claims examiner files a "memorandum of conference" copies of which are supplied all interested parties. It is supposed to detail the essential facts in connection with the claim, and to conclude with his recommendation in regard to payment or further indicated course of action.

In reply to your question as to whether such a memorandum can be said to be the equivalent of a finding by the Deputy Commissioner, you are advised that the Commission believes that the compensation order contemplated by the Act requires the approval and signature of the Deputy Commissioner. When such an Order is filed, it becomes binding upon the parties in interest and subject to review on questions of law by the Federal Courts within the statutory period. Memoranda of conferences are not regarded as binding upon the parties in interest and the insurance carrier may decline to comply with the recommendation of the claims examiner, the claimant may decline to accept the recommendation, and both parties retain their rights under the law to a formal hearing before the Deputy Commissioner.

Very truly yours,

SAMUEL S. LOWE,
SAMUEL S. LOWE,
Deputy Commissioner.

SSL:MB

Official Correspondence Should Be Addressed to the Commission

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York, 17, New York

Commissioners

JEWELL W. SWOFFORD
Chairman

WM. MCCAULEY
Secretary

JOHN M. MORIN

JOHN J. KEEGAN

In reply refer to File No. .....

December 18, 1943.

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Mr. Rassner:

In response to your inquiry by telephone as to the time when an election to take compensation under the Longshoremen's and Harbor Workers' Compensation Act becomes effective for the purpose of giving to an employer, by assignment under section 33 (b) of that Act, the employee's right of action against a third party, you are advised that section 33 (b) clearly states the time in the following language: "Acceptance of such compensation under an award i a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

The purpose of the 1938 amendment to section 33 (b) in this respect is too clear for argument, as may be observed by reading the comments of the Senate Judiciary Committee which reported the Bill, H. R. 5696 (see Sen-

ate Report No. 1988, Calendar No. 2100, 75th Congress, 3rd Session, page 9).

Section 33 (a) of the Longshoremen's Act provides for an election (1) to take compensation, or (2) to sue the third party. Notice of election *to sue* is provided for by form US-213. Notice of election to accept compensation is not required to be given in any special form, but the filing of a claim by an employee (Form US-203) indicates the employee's purpose and intention to claim compensation; and if pursuit of the claim to the point of a formal award in a compensation order, the *claim* plus the *formal award* completes the setting for assignment to operate under section 33 (b). In view of the language of section 33 (b) and the legislative history of the 1938 amendment to this section, it could hardly be validly asserted that assignment to the employer takes place any earlier than the date of acceptance of compensation under a compensation order. An employee who files a claim and before accepting compensation under an award, may desire to sue the third party. He would apparently have the right under the statute to exercise his third party remedy even though he had filed claim, provided he did not accept compensation under a formal award as the statute provides. The mere filing of the claim shows *prima facie* that the employee desires to pursue the compensation remedy, but according to the statute he does not lose his right to sue the third party *until* he accepts compensation in the matter indicated. Stated otherwise, while filing of claim indicates a desire to claim compensation, the election (for purposes of working the assignment) does not become effective until compensation is accepted under an award.

Very truly yours,

W. E. Boote,
W. E. Boote,
Chief Counsel.
HPM

All of the State Court cases which held to the contrary (including the case of *Ross* v. *C. D. Mallory*, 1943 A. M. C. 729, not officially reported, relied on by petitioner), were based on the decision in the case of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859), however, on January 2, 1945, the Appellate Division of the Second Department, which had decided the *Jakuboski* case, reversed itself in the case of *Ricciardi, appellant* v. *American Export Lines, Inc., respondent, supra*, as follows: 268 App. Div. 606.

> "We believe that subdivisions (a) and (b) should be read as one continuous, integrated enactment. Thus read, there is required the holding that the acceptance of compensation which was paid without an award did not constitute an election by the plaintiff to accept compensation rather than to sue a third party (*Tartaglio* v. *Cunard White Star, Lim.*, 56 Fed. Supp. 55; *Pugliese* v. *Panama Transport Co.*, opinion by Judge Coxe in the U. S. District Court for the Southern District of New York, October 5, 1943, not officially reported; *Brusch* v. *Grace Line, Inc.*, 56 Fed. Supp. 48; *Cupo* v. *Isthmian S.S. Co. Inc.*, 56 Fed. Supp. 45; Report No. 1945, House of Representatives, 75th Congress, Third Session, entitled 'Amending the Longshoremen's and Harbor Workers' Compensation Act', dated March 14, 1938).
>
> This decision is not in harmony with our holding in the two cases of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859). When those cases were decided the legislative purpose and intention in amending the act in 1938, as expressed in the report to the House of Representatives and the uniform holdings of the federal courts interpreting the act as amended were not

called to our attention. Such legislative expression and federal court interpretation of this federal act make imperative retraction of our holding in the *Jakuboski* cases."

In the *Etna* case, *supra*, the Court laid down the principle that an employer is entitled to reimbursement for compensation paid to a claimant and a claimant may not have a double recovery.

As to the equities in the case, the realistic fact is that usually, the same insurance company which insures the ship, insures the employer and consequently the provision, that an employer may sue a third party to the benefit of the claimant, has no practical application of value.

In addition to the foregoing, an employer receiving lucrative contracts from a ship does not bring actions against the ship for benefit of his employee.

The fact is that a longshoreman receives but $20.00 a week against a maximum recovery of $7,500.00, regardless of the fact that he may have lost his limbs or been crippled for life or otherwise seriously and permanently incapacitated, as was Porello.

It is for these reasons that Congress in 1938 saw fit to amend the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. A., Secs. 901, *et seq.* by adding subdivision (b) requiring the acceptance of compensation under an award in a compensation order filed by a deputy commissioner, in order to bar a longshoreman from his right to proceed with a third party action.

It is interesting to note that the United States Government has not asked this Court to review the decision of the Court below, which held that Porello was not barred from maintaining an action, against the United States of America by reason of having accepted voluntary payments without any award.

Conclusion.

The Supreme Court of the United States has already interpreted the intent of Congress with reference to the Public Vessels Act, *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, holding that the United States of America, under said Act, has consented to become suable for a personal injury claim and has waived sovereign immunity by said Act, placing public vessels in the same position of liability for torts, as did the Suits in Admiralty Act, 46 U. S. C. A., Sections 741-752, Act of March 9, 1920, C. 95, Sec. 1, 41 Stat. 525, with reference to government owned merchant vessels.

Substantial justice demands that in a situation as presented herein, particularly where general merchandise was being loaded aboard the vessel, that the Public Vessels Act should be read together with the Suits in Admiralty Act and considered as some of our lower Courts have stated in "*pari materia*".

Congress, having refused to pass any Act which limited suits to property damage and damage caused by collision, and only passed the Act after it was interpreted to include *all maritime accidents of any kind*, the ordinary construction of the English language should be given, and the words *all* and *any kind* should include personal injury claims.

All Acts of Congress, on this question, both prior and subsequent to the Public Vessels Act, clearly demonstrate that Congress was not in sympathy with the principle "that the King can do no wrong", and has consistently endeavored to enact legislation which would prevent technical defenses, to the intent of Congress, to afford redress for maritime torts, to persons injured and not only to entities suffering property damage.

As to the question of the libelant having received voluntary payments constituting a bar to his action, it must be borne in mind that prior to the amendment to the Long-

shoremen's and Harbor Workers' Compensation Act, by adding subdivision (b), such was the interpretation and Congress amended the Act by adding to the aforesaid Act 33 U. S. C. A. 933 subd. (b), so that this very evil might be eliminated and an injured person not be deprived of his day in Court by his employer giving him a few dollars, while the injured person was in complete ignorance of the effect of accepting same and perhaps confined to a hospital and in dire need. The purpose of requiring a formal award so that a responsible person, such as a deputy commissioner of a Government Bureau might inform the injured person of his rights, and thus prevent overreaching and undue advantage being practiced on an ignorant, uneducated or uninformed laborer.

Insofar as this Court has held that a federal employee injured aboard a vessel is not barred from maintaining a third party action by having accepted voluntary payments without a final award, *Brady* v. *Roosevelt S.S. Co., supra*, it is only fair and just that the same principle should apply to a longshoreman, who likewise accepted some voluntary payments without any award.

The Decree Appealed From Should Be Affirmed.

Respectfully submitted,

JACOB RASSNER,
Proctor for Respondent,
Rosario Porello.

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CLERK

No. 996

In the Supreme Court of the United States

OCTOBER TERM, 1945

AMERICAN STEVEDORES, INC., PETITIONER

v.

ROSARIO PORELLO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 996

AMERICAN STEVEDORES, INC., PETITIONER

v.

ROSARIO PORELLO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Essentially, the petition for a writ of certiorari filed in this case presents five questions: (1) Whether a libel in admiralty may be maintained against the United States under the Public Vessels Act (43 Stat. 1112–1113, 46 U. S. C. 781–789), to recover for personal injuries; (2) whether, if jurisdiction exists under that Act, the United States is entitled to be fully indemnified by the contractor under the pertinent provision of a "Warshipsteve" contract, in a case where, as under the holding below, the United States and the impleaded contractor are joint tort feasors; (3) whether a court sitting in ad-

miralty has authority to construe the indemnity clause of the "Warshipsteve" contract or whether this is a "non-maritime" question over which an admiralty court lacks jurisdiction; (4) whether the acceptance, not under an award, of compensation by an injured stevedore under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. 901, *et seq.*) constitutes a bar to the bringing of a negligence action by him against a third party tort feasor; and (5) whether a right of contribution between joint tort feasors in admiralty exists where one of the negligent parties is the employer of the libelant and is immune from suit by reason of the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, *supra*. Petitioner recognizes that the last stated question is not directly involved in the circumstances of this case.

If jurisdiction exists to entertain a libel against the United States under the Public Vessels Act, *supra*, to recover for personal injuries, the decision of the court below, we believe, properly holds that the provisions of the "Warshipsteve" contract entitle the United States to be fully indemnified by the impleaded petitioner as joint tort feasor. As the court below recognized, however, its judgment rests initially upon the proposition that the Public Vessels Act permits recovery from the United States for personal injuries. This is a question of importance requiring a determina-

tion whether the word "damages" as used in that Act embraces more than property damage. For the reasons suggested in petitioner's brief (pp. 11–16), we do not believe that the waiver of sovereign immunity effected by that Act permits suit for other than property damage caused by a public vessel.

It is further recognized that the question whether a binding election was made by the injured stevedore in accepting compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act in the circumstances here presented is also a question of considerable importance not easily resolved by an examination of precedent.

Accordingly, we do not oppose the granting of the writ.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

APRIL, 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1946.

AMERICAN STEVEDORES, INC., PETITIONER

v.

ROSARIO PORELLO AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated October 18, 1943, which overruled the Government's exceptions (R. 7–8), is reported at 53 F. Supp. 569. An opinion of that court on the merits dated December 6, 1944 (R. 68–71), is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 85–91) is reported at 153 F. 2d 605. Its *per curiam* opinion denying a petition for rehearing (R. 101–102) is reported at 153 F. 2d 609.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on January 10, 1946 (R. 91). A petition for rehearing (R. 92–100), filed by petitioner on January 23, 1946, was denied by the court below on January 31, 1946 (R. 103). The petition for a writ of certiorari was filed on March 25, 1946, and was granted on May 6, 1946 (R. 113). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a libel in admiralty to recover for personal injuries may be maintained against the United States under the Public Vessels Act.

2. Whether an action may be maintained by a longshoreman against a third-party tortfeasor to recover for personal injuries after he has accepted compensation for the same injury under the Longshoremen's and Harbor Workers' Compensation Act, voluntarily paid without an award by a deputy commissioner.

3. Whether, assuming an affirmative answer to both the foregoing questions, the United States was entitled in the instant case to be fully indemnified by petitioner.

4. Whether a court sitting in admiralty has authority to enforce the provisions of a stevedoring contract as establishing a right of indemnity,

or whether this constitutes a nonmaritime matter of which an admiralty court has no jurisdiction.

STATUTES INVOLVED

Pertinent provisions of the Public Vessels Act, c. 428, 43 Stat. 1112–1113 (46 U. S. C. 781–790); of the Federal Tort Claims Act, Title IV, Act of August 2, 1946, Public Law 601 (79th Cong., 2d Sess); and of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended (33 U. S. C. 901–950), are set forth in the Appendix, *infra*, pp. 51–54.

STATEMENT

On March 29, 1943, respondent Porello filed in the United States District Court for the Southern District of New York a libel (R. 2–5), and on November 18, 1943, an amended libel (R. 9–11) under the Public Vessels Act, 1925, to recover for injuries which he suffered on September 23, 1942, allegedly as the result of the negligence of the United States. While the libels did not so allege, at the time such injuries were sustained Porello was employed by the petitioner, which was engaged under a general stevedoring contract with the United States in loading the Navy transport U. S. S. *Thomas Stone*. While working in the No. 1 hold of the *Thomas Stone*, Porello, was struck by a falling thwartship beam and hatch covers in circumstances hereinafter described.

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On June 23, 1943, the United States filed exceptions and exceptive allegations to the libel (R. 5–6), seeking its dismissal on the ground that the Public Vessels Act does not permit the maintenance of a libel to recover for personal injuries. The exceptions and exceptive allegations were overruled on October 25, 1943 (R. 8), and on November 25, 1943, the United States answered (R. 11–13), preserving its objection to the jurisdiction of the court and denying negligence. On May 8, 1944, the United States impleaded American Stevedores, Inc., the petitioner in this Court, under Admiralty Rule 56, by a petition alleging that the negligence, if any, was that of the stevedore and setting forth certain provisions of the stevedoring contract between the Government and the petitioner (R. 13–15). The stevedore's answer (R. 15–18) denied fault and as an affirmative defense alleged that Porello, by electing to accept compensation payments under the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, as amended (33 U. S. C. 901 *et seq.*), had lost his right to maintain an action against a third-party tortfeasor prior to the filing of the libel.

Petitioner's stevedoring contract with the United States contained, among others, the following provisions in Articles 4, 12 and 13 (R. 65–66):

> [4] * * * The Stevedore shall, at its own cost and expense, rig and unrig all gear, rigging and equipment necessary for

loading heavy lifts when handled by ship's gear. The stevedore shall take off and put on all hatches, beams and tarpaulins; load, shift and lay all dunnage other than flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

* * * * *

12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants.

13. The Stevedore shall at its own cost and expense carry the following insurance protection:

(a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees, and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled "Longshoremen's and Harbor Workers' Compensation Act" (Public #802).

(b) Liability to the public in the amount of $50,000.00 indemnity as respects bodily injury to or death of one person and subject to that limit for each person and in a total amount of $150,000.00 as respects bodily in-

jury to or death of more than one person on account of any one accident.

The libel and amended libel alleged that the United States was at fault in causing Porello's injuries by failing to have one of the vessel's winches in proper order (R. 4, 10). At the trial the libel was again amended to allege solely that the United States had been negligent in failing to provide a locking device on the thwartship beam or strongback which, together with the hatch covers it supported, fell upon Porello (R. 19). The thwartship beam in question was one of three one-ton strongbacks laterally transversing the aperture in the 'tween deck immediately above the No. 1 hold of the vessel. Prior to commencing loading operations, two of these beams were removed but the forward beam was left in place. (R. 49.) DiMare, petitioner's foreman, inspected this beam, which rested in slots placed in the permanent structure of the platform deck immediately above the hold, and saw that it did not have any locking device on it such as would prevent it from becoming dislodged by pressure on its underneath side (R. 54–55). DiMare nevertheless left the beam in place and neither took any steps to lash it securely in its sockets nor reported the absence of a locking device to anyone (R. 55; cf. 22). The accident occurred on the following day when DiMare ordered a one and one-half ton motor vehicle, which had already been lowered into the hold and swung underneath the beam,

raised for the purpose of stowing it in a different section of the No. 1 hold (R. 50–51). Although the vehicle did not lift when he gave this order, DiMare made no investigation of the reason why the vehicle remained stationary, but instead repeated the order (R. 51). The vehicle was thereupon lifted approximately a foot above the floor of the hold (R. 51–52, 54). A wooden spreader passing above the vehicle and attached to the wires of the sling in which it rested was caught on the thwartship beam. As a result of raising the vehicle, the beam was lifted from its slot and it and a number of hatch covers fell into the hold. (R. 26, 51, 54.) The beam struck Porello, inflicting severe injuries, resulting in permanent partial disability (R. 52).

Within two weeks after the accident, workman's compensation payments to Porello were voluntarily commenced by petitioner's insurance carrier. Beginning October 5, 1942, the carrier issued checks to Porello at two-week intervals until July 12, 1943, some 14 weeks after the filing of the libel (R. 76–77). None of such payments was made under an award by a deputy commissioner of the United States Employees Compensation Commission. All of these checks were endorsed and cashed by Porello. (R. 80, 82.) On March 26, 1943, Porello gave notice to the insurance carrier and petitioner of his intention to sue the United States as a third-party tortfeasor (R. 80), and on March 29, 1943, brought this suit.

The district court entered findings of fact, conclusions of law, and an opinion on December 6, 1944, holding (1) that Porello, not having accepted compensation under an award by a deputy commissioner, was not barred from maintaining the action; (2) that the United States had been negligent in failing to provide Porello with a safe place in which to work; and (3) that petitioner stevedore had been negligent in the performance of its loading operations (R. 68–71). The district court's final decree, dated December 19, 1944, awarded judgment in the amount of $11,581.77 against the United States and decreed that it should receive contribution from petitioner to the extent of one-half of the judgment, the amount of both the damages awarded Porello and the contribution awarded the United States to be reduced by an amount equal to the compensation payments which had been accepted by Porello (R. 71–72).

On cross-appeals by the United States (R. 73–74) and the stevedore (R. 83), the court below affirmed the rulings of the district court sustaining Porello's right to maintain the libel, and increase the amount of his recovery to $21,781.77 (R. 85–91). It further held that "the absence of the lock [on the beam] and DiMare's negligent order operated concurrently in producing the result" (R. 88). The court below, however, modified the decree of the district court by providing that the United States should be fully indemnified by peti-

tioner for the judgment obtained against it (R. 89). The court below, by a *per curiam* opinion, denied the stevedore's petition for rehearing (R. 101–102).[1]

SUMMARY OF ARGUMENT

1. There exists some evidence of a subsequent Congressional understanding that the Public Vessels Act embraces personal injury actions, which may properly be evaluated in determining its scope. Such evidence is contained in the recently enacted Federal Tort Claims Act which excepts from its scope "any claim for which a remedy is provided by" the Public Vessels Act. Apart from this, the use of the unqualified word "damages" in the Public Vessels Act would seem on its face to include damage to persons as much as damage to property. In view of the legislative history of the Public Vessels Act there may, however, be reason to doubt whether the statute was intended to sanction personal injury actions.

2. Petitioner's contention that the acceptance, not under an award, of compensation under the Longshoremen's and Harbor Workers' Compen-

[1] In its original opinion the court expressed the view that contribution could not be awarded in the instant case by reason of petitioner's immunity from direct suit under the provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 905). In its opinion denying rehearing, the court receded from this position, stating that "the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under the respondent's contract" (R. 101).

sation Act by the respondent Porello, prior to the filing of his libel herein, constituted a binding "election" preventing the subsequent maintenance of this action is without merit. Neither the language of that Act nor the legislative history relied upon by petitioner warrants such a conclusion.

3. The decision of the court below conferring a right upon the United States to receive indemnity from petitioner for the judgment awarded Porello against the Government is correct. There is here involved a contract clause which specifically provides that the petitioner "shall be responsible for any and all damage or injury to persons, and cargo" occurring in the course of petitioner's stevedoring work "through the negligence or fault of the stevedore, his employees and servants." The findings of both of the courts below, fully supported by the evidence, that petitioner was negligent conclusively establishes the applicability of this provision, irrespective of the findings below that the negligence on the part of the Government operated concurrently with that of petitioner in causing Porello's injuries. Petitioner's contention that this clause only allows the Government to indemnify itself when there has been no fault on the Government's part would render the clause meaningless, since the Government would not then be liable in any event. Furthermore, apart from the specific contractual provision for indemnity, the Government

would have a right to indemnification from the petitioner under recognized principles of admiralty and common law. The general relationship established by the contract made the petitioner-stevedore responsible for the loading of the vessel and made it liable to the owner of the vessel for its negligence occurring during the loading operation even though the owner might be liable to a third party. And entirely apart from the contractual relationship, it seems clear that the petitioner was primarily responsible for the accident because its negligence partook of the character of recklessness, and because the relative fault of the United States was so slight as to warrent the application of the principle of admiralty that in such circumstances the party whose fault was major shall pay the entire damages.

ARGUMENT

I

THE LEGISLATIVE HISTORY OF THE PUBLIC VESSELS ACT DEMONSTRATES NO EXPRESS CONGRESSIONAL INTENTION TO WAIVE IMMUNITY FROM LIABILITY FOR PERSONAL INJURY CAUSED BY A PUBLIC VESSEL

The enactment of the Federal Tort Claims Act[*] subsequent to our acquiescence in certiorari herein has substantially diminished the broad significance of the question whether the Public Vessels Act, 1925, grants jurisdiction of actions to recover

[*] Act of August 2, 1946, Title IV, Pub. L. 601, 79th Cong., 2d Sess., Appendix, *infra*, pp. 52–53.

for personal injury. That Act permits the bringing against the United States of a libel *in personam* in admiralty "for damages caused by a public vessel of the United States" (Appendix, infra, p. 51). A holding that the Public Vessels Act does not authorize suit for personal injury will, in respect to causes of action arising after January 1, 1945, simply remit a claimant to the remedy provided by the Tort Claims Act.[3] But it must be emphasized that Congress chose not to make the provisions of the Tort Claims Act generally applicable to maritime actions sounding in tort. On the contrary, by express provision of that Act,[4] suits for property damage caused by all government-operated vessels, and suits for personal injuries, at least when caused by merchant vessels operated by the Government, remain cognizable under the Suits in Admiralty and Public Vessels Acts. While waivers of sovereign immunity are strictly construed, now that tort liability is general it would be incongruous for a

[3] In respect of claims arising on or after January 1, 1945, the Act provides generally that suit may be maintained "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred."

[4] Section 424 (a).

single type of maritime tort—personal injury caused by a public vessel—to be actionable only under the Tort Claims Act whereas all other maritime torts for which the United States is responsible remain actionable under the specialized maritime legislation. It is unlikely that Congress deliberately intended so anomalous a result. On the contrary, it would seem that a broad interpretation of the waiver effected by the Public Vessels Act is justified.[5] Cf. *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228.

Nonetheless, a solution of this problem is not only indispensable to the disposition of this case, since Porello's injury occurred in 1942, prior to the effective date of the Tort Claims Act, but is essential to furnish definitive guidance to future litigants as to the proper Act under which to assert their claims,[6] since the Tort Claims Act does not apply to any claim for which a remedy

[5] Subsequent legislation is a proper aid in the construction of prior enactments. *Tiger* v. *Western Investment Company*, 221 U. S. 286, 289; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 276; cf. *United States* v. *Hutcheson*, 312 U. S. 219.

[6] *E. g.*, the Tort Act contains a one-year limitation period, whereas suit may be brought under the Public Vessels Act within two years. Again, a foreign national may maintain a suit for personal injury under the Tort Claims Act (assuming no difficulty as to venue) (see Sec. 410 (a); cf. *McGhee* v. *United States*, 154 F. 2d 101 (C. C. A. 2)) without the showing required under the Public Vessels Act (Section 5, 46 U. S. C. 785) that his country furnishes reciprocal rights to citizens of the United States.

is provided by the Suits in Admiralty or the Public Vessels Acts. Accordingly, we outline the considerations which originally led us to acquiesce in certiorari to review this question.

The use of the unqualified word "damages" would seem on its face to include damage to persons as much as damage to property.[7] In view of the legislative history of the Public Vessels Act there may, however, be reason to doubt whether the statute was intended to sanction personal injury actions.

The legislative history of the Public Vessels Act, elaborately discussed in petitioner's brief, is quickly summarized. On May 29, 1924, Mr. Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit

[7] The one decision directly holding that the Public Vessels Act extends to suits for personal injury (*New England Maritime Co.* v. *United States*, 55 F. 2d 674, 685 (C. C. A. 1)), involved a situation where death ensued to those aboard the nongovernment vessel as a direct result of a collision and proceeded on the theory that the Act was "remedial, and, under well settled practice of statutory construction, should be liberally construed."

"for damages caused by collision by a public vessel," and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge.[8] It did not have the unqualified approval of the interested departments, which were insisting on important changes.

The omission of H. R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello. But protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Committee, in-

[8] House Judiciary Committee, Hearings on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924. The Maritime Law Association had previously supported H. R. 13591, 66th Cong., 2d Sess., a bill similar to H. R. 6989. House Judiciary Committee, Hearings on H. R. 13591, 66th Cong., 2d Sess., February 2, 1921.

troduced H. R. 9535, which, in place of limiting its grant of jurisdiction to suits "for damages caused by collision by a public vessel," covered all suits "for damages caused by a public vessel." The purpose of this change is nowhere discussed.[9] Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong. Rec. 2087): "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."[10] Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the

[9] The words chosen bear a striking resemblance to those used in the British Admiralty Courts Jurisdiction Act, 1861 (24 Vict. c. 10, s. 7), and the Vice Admiralty Courts Act, 1863 (26 Vict. c. 24, s. 10), concerning the interpretation of which the Government has commented in its memorandum in *United States* v. *Lauro*, No. 514, this Term.

[10] Earlier bills, intended to cover only property damage, had employed the formula "for any loss, damage or injury to property, due in whole or in part to the fault of any vessel owned or operated by the United States." S. 4752, 65th Cong., 2d Sess.; H. R. 12667, 65th Cong., 2d Sess.

Public Vessels Act was not intended to cover suits for personal injury."

II

PETITIONER'S CONTENTION THAT PORELLO'S PRIOR ACCEPTANCE OF COMPENSATION PAYMENTS, NOT UNDER AN AWARD, BARS HIS ACTION AGAINST THE UNITED STATES WOULD APPEAR WITHOUT FOUNDATION

Neither in the lower courts nor here has the Government joined in petitioner's objection to jurisdiction based on Porello's acceptance, prior to the filing of his third-party action, of compensation payments tendered him under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended (33 U. S. C. 901–950). The point is treated at some length in the brief of respondent Porello. Accordingly, we confine our presentation to a discussion of certain inferences drawn by petitioner from the legislative history of the Compensation Act which, following consultation with the United States Compensation Commission, we deem to be erroneous.

Petitioner contends that a binding election waiving his third-party rights was made by Porello under the provisions of Section 33 (a) of

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[11] Some evidence that the Act was not understood by various Congresses to have granted jurisdiction with respect to personal injuries appears from the subsequent enactment of private bills compensating individuals for injuries "caused by" public vessels. See, *e. g.*, Act of June 23, 1938, c. 635, 52 Stat. 1388, H. Rep. 1891, 75th Cong., 3d Sess.; Act of June 14, 1941, c. 205, 55 Stat. 927, S. Rep. 106, 77th Cong., 1st Sess.

the Act (33 U. S. C. 933 (a)) when he collected compensation checks delivered to him at two-week intervals commencing October 5, 1942. Petitioner recognizes that since such payments were not made under an award by a deputy commissioner, the acceptance of the payments did not operate as an assignment to petitioner as Porello's employer of the right to proceed against a third-party tortfeasor under Section 33 (b) as amended (33 U. S. C. 933 (b)). As amended in 1938 that Section specifically provides that such an assignment occurs only upon acceptance of payments "under an award in a compensation order filed by the deputy commissioner." However, petitioner seemingly contends that acceptance of payments although not under an award, suspends the right otherwise provided by the Act of seeking recovery from a third-party tortfeasor, and effectively bars both the injured employee and his employer from such a remedy (Pet. Br. 30). Nothing in the language of Section 33 (a) or the legislative history of the Compensaton Act warrants such a conclusion.[12]

1. Section 33 (a) sets no time limit within which an "election" is to be made.[12] Moreover,

[12] Section 33 (a) provides: "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

the manner of election is specified; notice must be given the deputy commissioner of the employee's choice of remedy. In certain circumstances actual notice of an intention to sue the third party might preclude any right to receive further compensation under the Act. Literally read, Section 33 (a) would also seem to contemplate that an employee, although believing that third-party liability might exist, nonetheless may give notice of an intention to take compensation. It is conceivable that giving such notice might bar a third-party suit thereafter. But in the instant case the proceeding brought by Porello was in conformity with notice given the commission on March 30, 1943 (R. 89), of an intention to pursue his remedy against the United States as a "person other than the employer [who] is liable in damages." We see no warrant in the statute for barring the prosecution of such an action.

2. Petitioner's contention with reference to the legislative history of the Act and particularly the 1938 amendment to Section 33 (b) would seem to be summarized in the statement contained in its brief (p. 32) that:

> Surely, if Congress had intended, by its 1938 amendment of subdivision (b) of [Section 33 (b)] * * * to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the

previous year's amendment of the New York State Workmen's Compensation Law.

This argument, however, fails completely when it is realized that Congress in 1938 was not purporting to amend the federal statute with reference to the 1937 amendments to the New York law. For several years prior to 1938 the United States Employees' Compensation Commission had recommended the amendment of Section 33 (b) in the form finally adopted. In 1935 two previous bills, S. 2791 and H. R. 8293, 74th Cong., 1st Sess., had been introduced proposing the amendment of Section 33 (b) identical with that adopted in 1938. Furthermore, the letter of the Chairman of the Compensation Commission attached to H. Rep. 1945, 75th Cong., 3d Sess., p. 2, which again proposed the amendment, was written on February 24, 1937, whereas the amendments to the New York Act were not made until September 1 of that year. Finally, the excerpt from H. Rep. 1945, *supra*, quoted in petitioner's brief (p. 31)[13] referred not to the New York law as it read after the 1937 amendments, but as it existed prior thereto. See *Hession* v. *Sari Corporation*, 283 N. Y. 262; compare New York Laws of 1935, ch. 328, with New York Laws 1937, ch. 684. The inference petitioner seeks to draw from the fact that Congress did not amend the Longshoremen's and

[13] That "This amendment follows the New York workmen's compensation law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action."

Harbor Workers' Act in 1938 as fully or in precisely the same terms as had the New York legislature in dealing with its Compensation Act is therefore erroneous.

The Federal Act was amended for the specific purpose of avoiding the result reached in certain earlier decisions (*e. g., Sciortino* v. *Dimon S. S. Corp.*, 39 F. 2d 210 (E. D. N. Y.), affirmed, 44 F. 2d 1019 (C. C. A. 2)) which had construed Section 33 (b) as originally enacted to provide that mere acceptance of compensation without an award worked an assignment to the employer of the right to proceed against the third party. But it would appear plain that from the failure of Congress in 1938 to amend Section 33 (a), no inference can be drawn that third-party rights were intended to be left "suspended," in the sense referred to by petitioner (Pet. Br. 30), following the acceptance of compensation not under an award. No contemporaneous or prior court decision had so held and no language in the section itself is indicative of this result. See *Grasso* v. *Lorentzen*, 149 F. 2d 127, 128–129 (C. C. A. 2), certiorari denied, 326 U. S. 743.

III

THE COURT BELOW CORRECTLY DECREED FULL INDEMNITY IN FAVOR OF THE UNITED STATES

Petitioner does not challenge the concurrent finding of the district and appellate courts that it was guilty of negligence, but denies the conclu-

sions of the court below that the primary duty of care was upon it and that the conduct of its foremen was the active cause of the injury."[14] Petitioner apparently does not seriously deny that the United States is at least entitled to receive contribution from it should this Court hold that the Public Vessels Act extends to damages caused by personal injury. But it insists that the court below erroneously held that Article 12 of the stevedoring contract (*supra*, p. 5) established the right of the United States to full indemnity from petitioner (Pet. Br. 36–43), and it rejects the Government's contention that in any case it is entitled to full indemnity under the general law maritime (Pet. Br. 47). Petitioner also attempts to draw a distinction in respect of admiralty jurisdiction under Admiralty Rule 56 between situations where the right of respondent to indemnity or contribution is claimed under the general law maritime and those where the right is asserted under an indemnifying clause included as an incident of a contract for stevedoring or other maritime service (Pet. Br. 48–52). We submit (1) that the court below correctly con-

[14] See R. 89; 133 F. 2d at 608: "The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it." Cf. Article 4 of the contract (*supra*, p. 4), expressly declaring that the stevedore was responsible for taking off and putting on all hatches and beams.

strued the provisions of Article 12 of the contract; (2) that even in the absence of such a governing contractual provision the United States would be entitled to full indemnity in the circumstances of this case, and (3) that the purported distinction in jurisdiction on impleader which petitioner attempts to draw is without merit.

A brief analysis of the evidence respecting the occurrence of Porello's injury conclusively shows that the reckless conduct of petitioner's foreman DiMare and not the mere absence of a locking device on the hatch beam was the predominant cause of the accident. The plain terms of the contract expressly declared it to be the duty of the stevedore to perform what are in any case the usual functions of such a contractor in opening and closing hatches, removing and replacing beams and arranging for the stowage of cargo. Cf. *Imbrovek* v. *Hamburg-American Steam Packet Co.*, 190 Fed. 229, 232 (D. Md.); *The Susquehanna*, 176 Fed. 157, 158 (E. D. N. Y.). Thus in Article 4 of the contract it was expressly provided (R. 65):

> The stevedore shall take off and put on all hatches, beams and tarpaulins; load, shift and lay all dunnage other than flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

Petitioner's foreman DiMare testified that it was his job to determine how many hatch covers should be taken off (R. 49). Petitioner's superintendent testified no instructions were given the stevedores about leaving the beam in place (R. 21). As stated by an independent stevedore appearing as an expert witness, locking devices are not required by regulations of the United States Bureau of Navigation and the absence of a locking device on the forward thwartship beam would not ordinarily be of significance in the performance of "a straight loading job" such as petitioner was doing on the *Thomas Stone* (R. 64). The beam weighed about a ton and when in place fitted in sockets nearly one foot deep (R. 57). It could be dislodged only by being lifted from its socket, and ordinarily there would be no occasion during loading when an upward pressure of over a ton might be exerted on the underside of the beam (R. 25, 64). In view of this testimony, it can hardly be claimed that injury to a longshoreman should have been foreseen by the Government from the mere fact that the beam weighing a ton was not equipped with a locking device.[15] Moreover, the hold of the

[15] Petitioner's own superintendent testified as follows as to DiMare's conduct (R. 22): "Q. He was an experienced man, was he not? A. Yes, sir. Q. And if he knew that there was no locking device on the end of the beam, you would expect him to do something, wouldn't you? A. Positively. Q. You would expect him to take some means to see that the beam did not get unshipped or that the danger of unshipping it was absent? A. That is right."

vessel was provided by the Government with hydraulic roller-jacks on which to move vehicles from place to place in the hold without the necessity of raising the vehicles in the slings by which they had been lowered into the hold (R. 40). Again, it was hardly foreseeable by the Government that DiMare would reject this method of handling and instead recklessly adopt a course which led directly to Porello's injury.

That DiMare knew of the absence of the locking device—the only fact from which negligence is imputed to the Government—is admitted (R. 55). He learned of this condition prior to commencing loading operations when he supervised taking off the hatch covers immediately above the No. 1 hold (R. 55, *cf.* 49, 74). At that time, he neither took the precaution of having the unremoved beam lashed in place—an operation which would have taken at most five minutes (R. 37, *cf.* 41–42, 59)—nor even considered the absence of a locking device on the beam of sufficient importance to bring to the attention of the ship's personnel (R. 55). Yet he was in complete charge of the stevedoring operations in that hold (R. 21, 27, 30), having received instructions only as to the order in which the cargo should be stowed (R. 21, 26–27).

Assuming, in view of the findings of both courts below, that the United States was negligent in failing to have a beam weighing a ton equipped

with a locking device,[16] we submit that DiMare's subsequent conduct in failing either to remove the beam or to lash the unremoved beam in place and in ordering a one and one-half ton vehicle raised while still resting in the sling in which it had been lowered into the hold, despite his knowledge that the beam was not secured and might become unseated, cannot be termed less than reckless. As a result of leaving the beam in place, the headroom under the part of the hatch thus left covered was just sufficient for an average man (R. 27), and, since the vehicle was over five feet in height (R. 66), it is obvious that the spreader above it must have been almost in contact with the under side of the beam at the time DiMare ordered it raised. That the spreader was almost against the beam also follows from the fact that the sockets in which

[16] The statement of the court below that, "Such a lock is customary, and the plans of the vessel called for it * * *" (R. 87) is not sustained by the record. The only testimony appearing in the record concerning the vessel's plans was given by a deck officer of the *Thomas Stone* who stated that he had examined such plans in the shipyard in which the vessel was converted for transport use, and that no locking device was called for by those plans, nor was any hole made in the beam for the insertion of a lock (R. 47–48, cf. 31). The only testimony concerning the frequency of installation of such locking devices was that of a Naval officer who stated that "I have seen both arrangements in hatch beams, with and without locking devices," but who could not say which arrangement was the more prevalent (R. 35). Such locking devices are not required by the safety regulations of the United States Bureau of Navigation (R. 64).

the beam rested were a foot deep, yet the beam was unshipped when the vehicle had been raised only a foot (R. 54). DiMare, standing at the opposite end of the vehicle from Porello at the time he gave the order to "pick it up a little bit" (R. 51), had only to glance along the length of the vehicle which had been turned from the position in which it had been lowered to a position underneath the beam (R. 27) to see that if raised the spreader could not clear the beam. Even had DiMare been ignorant of the fact that the beam was not secured, ordinary prudence and common practice of stevedores required him to find out whether the beam was made fast in some way before ordering such a maneuver (R. 28–29, 58–59). Yet DiMare, with knowledge that the beam was not secure and that Porello was directly underneath it (R. 52), not only gave the command, but when the vehicle failed to rise in response thereto made no investigation as to the reason, but instead repeated the order (R. 51).

We have discussed the foregoing considerations somewhat at length because we believe that a proper appreciation of them shows that petitioner's negligence was the primary cause of the injury to Porello and that, accordingly, the Government is entitled to full indemnity whether under the provisions of Article 12 of the contract or under the general maritime law.

A. THE RIGHT OF THE GOVERNMENT TO FULL INDEMNITY IS ESTABLISHED BY THE CLEAR AND UNEQUIVOCAL LANGUAGE OF THE CONTRACT

It would seem clear that the court below was correct in holding that the United States was entitled to be fully indemnified by the petitioner. Clauses whereby one party to a contract agrees to assume all responsibility and to indemnify the other against liability on account of claims for personal injuries have long been employed by contracting parties and upheld by the Courts. *Standard Oil Co.* v. *United States*, 264 Fed. 66, 69 (C. C. A. 4); *Cacey* v. *Virginian Ry. Co.*, 85 F. 2d 976 (C. C. A. 4), certiorari denied, 300 U. S. 657; *City of Cleveland* v. *Baltimore & O. R. R. Co.*, 71 F. 2d 89 (C. C. A. 6); *Buckeye Cotton Oil Co.* v. *Louisville & N. R. R Co.*, 24 F. 2d 347 (C. C. A. 6); *National Transit Co.* v. *Davis*, 6 F. 2d 729 (C. C. A. 3).[17] Thus stevedoring contracts often provide that the shipowner shall be indemnified even where the fault is exclusively that of the shipowner and his employees and the stevedore is without fault.[18] Such provisions are no

[17] Accord: *J. V. McNicholas Transfer Co.* v. *Penna. R. R. Co.*, 154 F. 2d 265 (C. C. A. 6); *Franklin Fire Ins. Co.* v. *Chesapeake & O. Ry. Co.*, 140 F. 2d 898 (C. C. A. 6); *Baltimore & O. R. R. Co.* v. *Youngstown Boiler & Tank Co.*, 64 F. 2d 638 (C. C. A. 6); *Southern Ry. Co.* v. *Blunt & Ward*, 165 Fed. 258 (C. C. S. D. Ala.); *Watkins* v. *Baltimore & O. R. R. Co.*, 29 F. Supp. 700 (W D Pa.).

[18] *E. g.*, *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co.*, 23 F. Supp. 403 (S. D. N. Y.), affirmed, 100 F. 2d 1016, where the stevedore was required to indemnify in

more than reasonable since the shipowner must surrender temporarily the complete control of his vessel to the employees of the stevedore so that they may perform their work as they see fit. See *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229, 232 (D. Md.); *The Susquehanna*, 176 Fed. 157, 158 (E. D. N. Y.); cf. Article 4 of the present contract.

The various contracts employed by the United States since World War I have not, however, ordinarily gone so far as to require indemnity where its employees were alone at fault, but, like that here involved, have included language expressly confined to those cases where the Government was not solely at fault but there was at least some fault on the part of the contractor and his employees.[19] Thus the language here was:

> The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants.

Petitioner urges, however, that the protection of this unequivocal language must be still further

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cases "for which *either* or both of the parties hereto may or shall be liable."

[19] Compare Warshipsteve 3/1/44, Article 8, House Committee on the Merchant Marine & Fisheries, Compilation of Standard Contract Forms of the War Shipping Administration (1945), p. 513.

confined to cases where the Government was without fault by construing it as if it read "through the *sole* negligence or fault of the stevedore, his employees and servants." But the court below observed (R. 102; 153 F. 2d at 609), a construction limiting the indemnity to cases of the stevedore's sole fault would make the provision meaningless. Unless the Government were at fault in failing to furnish a seaworthy ship or by the affirmative negligence of its employees injured some third party, it would not be liable and could have no need of indemnity. The present is the very type of situation which requires such clauses. *Cacey v. Virginian Ry. Co.*, 85 F. 2d 976, 978 (C. C. A. 4), certiorari denied, 300 U. S. 657; *National Transit Co.* v. *Davis*, 6 F. 2d 729, 731–732 (C. C. A. 3); *City of Cleveland* v. *Baltimore & O. R. R. Co.*, 71 F. 2d 89, 91 (C. C. A. 6); *Watkins* v. *Baltimore & O. R. R. Co.*, 29 F. Supp. 700 (W. D. Pa.).

The contentions of petitioner deliberately disregard the rationale of the jurisprudence respecting clauses of this character.[20] This rationale is

[20] Petitioner's reference to the indemnity clause in *Weldon* v. *United States*, 65 F. 2d 748 (C. C. A. 1), as being similar to that in the case at bar is inaccurate. The clause there, while similar, was confined to "damage or injury to cargo." The United States sought indemnity against personal injury by reason of the clause requiring the contracting stevedore to "carry insurance protection" against such risks. In *Newport News Shipbuilding Co.* v. *United States*, 34 F. 2d 100, 107 (C. C. A. 4), such a provision for insurance protection had been held to be for the benefit of both contracting parties.

best stated in *Dudar* v. *Milef Realty Corp.*, 258 N. Y. 415, 421, where the court said:

> The contractor's contractual obligation was obviously intended to relieve the owner from liability for injury suffered by any person "in the course of the performance" of work by the contractor. The owner was not exposed to such liability in the first instance, unless failure, on its part, in some duty owed to the injured party contributed to the injury. A construction of the contractor's obligation which would exclude from its scope all injuries in which the contractor failed in some duty owed would entirely defeat the purpose of the obligation and render the obligation illusory. * * * Enough that the contractor's obligation plainly covers injuries caused by the contractor's negligence * * * where the owner's negligence, if any, was only passive and in the performance of a duty owed not to the contractor but to the injured party.

It is obvious that the fundamental question is accordingly whether the injury occurred in consequence of the performance of the contractor's work. Thus petitioner's reliance upon *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9), as conflicting with the result reached by the court below arises from petitioner's misconception of the rationale of that case. Indemnity was there denied because the accident occurred in the course of independent repair work carried on by the shipowner separately from the work being done

under contract by the indemnitor (repair contractor) and over which the latter had no authority or control whatever.[21] It was caused by the negligent handling of a scaffolding by one of the shipowner's employees in a "mode * * * so unusual that it could not have been reasonably anticipated either by the [injured party] or the contractor." No negligence was shown on the part of the contractor or his agents. The court held (18 F. 2d at 21):

> Effect and a reasonable construction may readily be given to the provision here by holding that it covers only cases where in respect to the injured person both contractor and owner are at fault. In going on the ship to do the work, and in using its tackle, the contractor had to take them as it found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe. While as to a workman the contractor's default in this respect might not relieve the owner from responsibility in case of an injury, it would make it reasonable to require the former alone to bear the loss; hence the provision for indemnity. * * * [But] we should not * * * conclude that the parties in-

[21] The district court rested the denial of indemnity squarely on that ground, observing (16 F. 2d at 313), "the intention being to provide against loss occasioned by the party's own conduct, over which the indemnified has no control, and not acts of negligence of the indemnitee, who has sole control of his own actions and of his agents or employees."

> tended the contractor should assume an obligation * * * [for an] act of negligence on the part of the owner, or of one of his employes, over whom the contractor had no restraint or control * * *.

The hypothetical situation thus posed by the court in that case is the actual situation here. For the purpose of conducting its stevedoring operations, petitioner had to be given a free hand on the vessel. Not only by virtue of generally applicable principles, but by clear intendment of the contract, "upon it rested the primary duty to its servants to see that both places and instrumentalities were reasonably safe." *United States* v. *Wallace, supra,* at p. 21; cf. Article 4 of the Contract, *supra,* p. 4, *Imbrovek* v. *Hamburg-American Steam Packet Co., supra,* 190 Fed. at 232; *The Susquehanna, supra,* 176 Fed. at 158; *The Thomas P. Beal,* 295 Fed. 877, 880 (W. D. Wash.). Petitioner failed completely in the performance of this duty. Even upon actual discovery of the absence of a locking device, it took no precautionary steps nor did it request that the United States do so. The situation would be no different had the beam been equipped with a locking device which was not fastened, and had petitioner's foreman, DiMare, noticing this fact, nevertheless taken no steps to fasten it. Following its failure to take any steps to insure the safety of its employees by lashing or otherwise securing the unremoved beam, petitioner, as shown above, con-

ducted its loading operations with reckless disregard of the known fact that the beam was not fastened down. As suggested by the court in the *Wallace* case, "the contractor's default in this respect might not [and here did not] relieve the owner from responsibility in case of an injury." But where the United States in contemplation of this possibility has provided that it shall be indemnified for accidents occurring in the course of the contractor's performance of the work unless the contractor shall have been in the exercise of due care, no reason exists, we submit, for not giving effect to that provision.

Petitioner's chief ground for attempting to exclude cases where both parties are at fault and to limit the protection of Article 12 to cases involving the sole fault of the stevedore is that, as we have seen, its language fails to extend to the limit of requiring the stevedore to indemnify the Government as shipowner even in cases where the Government alone is at fault (Pet. Br. 39–40). Petitioner also insists that the clause is insufficient under the generally accepted principle that express language is necessary to provide indemnity against the indemnitee's own fault (Pet. Br. 38–39). That supposed rule is not one of general application but the outmoded result of considerations of public policy in cases of common carriers. *Southern Ry. Co.* v. *Blunt & Ward,* 165 Fed. 258, 259 (C. C. S. D. Ala.); cf. *Trenton Pass. R. R. Co.*

v. *Guarantors Liability Indem. Co.*, 60 N. J. L. 246. The accepted rule for construction of agreements indemnifying against the indemnitee's own fault is well stated in *Buckeye Cotton Oil Co.* v. *Louisville & N. R. R. Co.*, 24 F. 2d 347, 348 (C. C. A. 6):

> * * * a contract will not be so construed, unless it was clearly intended to have that effect. This, of course, does not mean that the intention must be expressed in terms, but that, if not so expressed, it must otherwise clearly appear in the language used.

In the present case the language of the contract is plain and unequivocal that petitioner assumed responsibility and is bound to indemnify the United States. There is no necessity for resort to any aids to interpretation.

Petitioner implies that it was misled as to the effect of Article 12 of the contract and never intended to assume any risk where the fault of the Government itself contributed (Pet. Br. 42). But it was common knowledge that the United States had insisted on the broadest possible interpretation of this type of clause. See *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9). The language was not ambiguous, nor were contracting stevedores unfamiliar with such clauses. Petitioner is as chargeable with knowledge of its own obligation as is the Government. Cf. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296. To such contentions it would seem a short

answer that the courts are not at liberty to revise the contract since such items "naturally would enter into the calculations of the parties with respect to the rate to be charged." *Santa Fe Ry. Co.* v. *Grant Bros.*, 228 U. S. 177, 189; *Standard Oil Co.* v. *United States*, 264 Fed. 66, 69–70 (C. C. A. 4). The Government would have paid less without petitioner's assumption of such risks; more if it had asked indemnity against even its sole fault.[22]

B. EVEN WITHOUT THE CONTRACTUAL PROVISION, THE GOVERNMENT IS ENTITLED TO FULL INDEMNITY UNDER THE FACTS OF THIS CASE

Such negligence as the court attributed to the United States in failing to supply a vessel with beams equipped with locking devices was passive only. Even aside from the express provision of Article 12, the United States is entitled to full indemnity from petitioner, which was chargeable with active negligence in consequence of the reckless conduct of its foreman. It is common ground to the petitioner and the Government alike that the Longshoremen's and Harbor Workers' Com-

[22] Petitioner states that the defense of various actions has been returned to the assureds by their protection and indemnity insurers on the ground that an assured is not covered for liabilities assumed by contract (Pet. Br. 39). But the record is devoid of indication that such is here the case. Indeed, were liability declined, we might expect the insurer to have been impleaded. See *Tullgren* v. *Jasper*, 27 F. Supp. 413, 416, (D. Md.). There would be no jurisdictional difficulty since there is original admiralty jurisdiction of suits on P & I policies. *Eagle Star & British Dominion Ins. Co.* v. *George A. Moore & Co.*, 9 F. 2d 296 (C. C. A. 9).

pensation Act does not take away the Government's general legal right of recovery over against petitioner. Petitioner urges, however, that the United States may recover no more than contribution. We submit that the Government is entitled to full indemnity on the ground that the acts of petitioner's foreman were both a breach of its contractual duty properly to stevedore the vessel and also conduct so reckless as to require it to bear the entire loss.

1. The court below, after first stating that Section 5 of the Longshoremen's Act prevented the Government from recovering over against the petitioner, withdrew this dictum on rehearing as not essential to its decision after both petitioner and the Government indicated disagreement with it on this point.[22a] It would seem, however, that the immunity which the act gives petitioner from suit by Porello against it as his employer does not destroy the right of the United States to recovery over. The law is settled in that sense as regards the effect of the New York Compensation Act. *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175, 179; *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2). And with substantial unanimity the district

[22a] The court below after originally observing, "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability it has been compelled to pay" (R. 88; 153 F. 2d at 607), on rehearing remarked that the point might be left open as not essential to the decision (R. 101; 153 F. 2d at 609).

courts have followed the same rule in respect of the Longshoremen's Act.[23] It would seem that there could be no doubt on the point. The Government's right of indemnity or contribution is not derivative but original. It does not depend on any right of Porello against his employer. *The Tampico*, 45 F. Supp. 174, 175 (W. D. N. Y.); cf. *Erie R. R. Co.* v. *Erie & Western Transp. Co.*, 204 U. S. 220, 225–226.[24] The situation is identical with that arising under the Harter Act where the owner of a seaworthy vessel is relieved of liability to its own cargo, but must respond to the claim for liability over of another vessel in a "both to blame" collision situation. *The Chattahoochee*, 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394. Compare the situation resulting from the giving of a release. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, 1001 (C. C. A. 3).

2. Petitioner urges that the conclusion of the Court below that the negligence of petitioner

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[23] *The Tampico*, 45 F. Supp. 174, 175 (W. D. N. Y.); *Severn* v. *United States*, 1946 A. M. C. 1468, 1470 (S. D. N. Y.); *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, 305 (D. Me.); *Green* v. *War Shipping Adm.*, 66 F. Supp. 393 (E. D. N. Y.); cf. *Calvino* v. *Pan-Atlantic S. S. Corp.*, 29 F. Supp. 1022, 1023 (S. D. N. Y.).

[24] The correct distinction is well stated by Hulbert, D. J., in *Brosnan* v. *American President Lines*, 1943 A. M. C. 526, 528 (S. D. N. Y.): "If this were a case where the defendant was offering the plaintiff's employer to the plaintiff as the one solely liable for the injuries complained of, it might be

and the Government operated concurrently "militates * * * * against any consideration of active and passive negligence" and suggests that such considerations involve the comparative negligence rule (Pet. Br. 47).[25] We submit that this contention is unsupported by the court's opinion. The court's holding that the negligence of the United States and petitioner "operated concurrently in producing the result" does not imply a finding that the parties were in *pari delicto,* or a holding that the rights of the parties *inter-sese* may not be ad-

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doubted whether such employer could be joined as a third party defendant in view of the provisions of Sec. 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 905) whereby an employe's liability is limited. Such were the situations in *Calvino* vs. *Farley*, 1939 A. M. C. 190, 26 F. Supp. 431; *Calvino* vs. *Pan Atlantic S. S. Corporation*, 1940 A. M. C. 289, 29 F. Supp. 1022; and *Paolillo* vs. *Rederi A/B Disa*, 1941 A. M. C. 759, 38 F. Supp. 833. However, in the case at bar, the defendant seeks to allege a claim by way of remuneration or recoupment against the employer. As indicated in *Calvino* vs. *Pan Atlantic S. S. Corp.*, *supra*, such a claim may be set up in a third party complaint." Cf. *Cataldo* v. *A/S Glittre*, 41 F. Supp. 555, 557 (E. D. N. Y.).

[25] Contrary to petitioner's suggestion, the rule of primary and secondary liability or active and passive fault, recognizing a right of indemnity where the acts of two joint tortfeasors are of dierent character, has nothing to do with comparative negligence. See *Fidelity & Casualty Co.* v. *Federal Express*, 136 F. 2d 35, 40 (C. C. A. 6). It appears rather to be connected with the common law doctrine of last clear chance or with the major and minor fault rule of the American admiralty, whereby damages are not divided when the fault of one party is only slight and that of the other predominant.

judged upon a comparison of their conduct with respect to the injured person.

It seems obvious that the court declined to pass on the contention that the United States is entitled to indemnity irrespective of the contractual provisions simply because it considered it unnecessary to do so in view of the clear right of the United States to be indemnified by petitioner under the provisions of Article 12 of the contract. With respect to petitioner's role in causing Porello's injuries, the court below stated (R. 89; 153 F. 2d at 608):

> It [petitioner] was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision [Article 12, *supra*] was inserted in the contract for that purpose. The United States argues that, even without such a provision, it would be entitled to full indemnity. See *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Burris* v. *Am. Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2); *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. C. A. 9). However that may be, we

think the contract entitles it to full indemnity and the decree must be modified accordingly.

It is thus apparent that the court below did not hold that the petitioner and the United States were joint tortfeasors in the sense that they were in *pari delicto*. On the contrary, for the purpose of determining whether judgment might properly be rendered against the United States at all, it was necessary for the court below to decide whether "the absence of a lock and [foreman] DiMare's negligent order operated concurrently in producing the result." A holding that the sole negligence involved was petitioner's would have defeated Porello's action and relegated him to the acceptance of compensation under the Longshoremen's Act. The alternate holding that the negligence of both petitioner and the United States operated "concurrently in producing the result" permitted the entry of judgment against the United States predicated upon its failure to furnish Porello a safe place to work.

But the fact that judgment was thus rendered against the United States does not establish that as between the Government and petitioner, the latter may not be required to make the Government whole for any recovery awarded Porello. *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; cf. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327–328; *Fidelity*

& Casualty Co. v. *Federal Express Co.*, 99 F. 2d 681 (C. C. A. 6). Indeed, the court below obviously deemed the conduct of petitioner's foreman to have been the primary negligence involved. This follows not only from the fact that the court in the excerpt above quoted referred to petitioner's "primary duty to furnish its employees a safe place to work" (cf. *United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9); *The Thomas P. Beal*, 295 Fed. 877, 880 (W. D. Wash.), but also from the fact that the court expressed doubt whether "the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman * * *." Notwithstanding the validity of the court's decision in holding the Government liable to Porello in the circumstances of this case,[26] there exist well-defined grounds upon which the United States is entitled to recover full indemnity from petitioner.

The Government is entitled to full indemnity because the contractual relationship between itself as shipowner and the petitioner as stevedore was such that the duty of the latter skillfully and properly to stevedore the vessel was broken by

[26] Concurrent fault of another, although active, does not relieve one liable for neglect to furnish a safe place of employment. *Kreigh* v. *Westinghouse & Co.*, 214 U. S. 249, 257; *Deserant* v. *Cerillos Coal R. R. Co.*, 178 U. S. 409, 420; *La Guerra* v. *Brasileiro*, 124 F. 2d 553, 555 (C. C. A. 2), certiorari denied, 315 U. S. 824; *Southern Pacific Co.* v. *DeValle Da Costa*, 190 Fed. 689, 698 (C. C. A. 1); *Memphis Gas Co.* v. *Creighton*, 483 Fed. 552, 555 (C. C. A. 6).

the negligence of petitioner's foreman. The general relationship established by the contract made the petitioner-stevedore responsible for the loading of the vessel and made it liable to the shipowner for its negligence occurring during the loading operation even though the owner might be liable to a third party. As described in the Restatement of Restitution, c. 3, Section 95, the circumstances of such liability are as follows:

> Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

This rule is supported by a number of cases at law.[27] In admiralty it has been applied in *Guy* v. *Donald*, 157 Fed. 527, 530 (C. C. A. 4), and *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769, 771 (C. C. A. 9). Where, as in the case at bar, the contractor is guilty of active negli-

[27] *Pfau* v. *Williamson*, 63 Ill. 16; *Chicago Railways Co.* v. *R. F. Conway Co.*, 219 Ill. App. 220; *Minneapolis Mill Co.* v. *Wheeler*, 31 Minn. 121; *Brooklyn* v. *Brooklyn City R. Co.*, 47 N. Y. 475; *Interborough Rapid Transit Co.* v. *New York*, 237 App. Div. 612; *Newell Bridge & Ry. Co.* v. *East Liverpool Traction & Light Co.*, 7 Ohio App. 241.

gence the circumstance that structural defects, of which the contractor knew or might have known, contributed does not affect the result. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. C. A. 9); *The No. 34*, 25 F. 2d 602, 607 (C. C. A. 2); *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (C. C. A. 2), affirming 25 F. 2d 339 (E. D. N. Y.); cf. *The Aden Maru*, 51 F. 2d 599, 601 (S. D. Tex.).

The Government is likewise entitled to full indemnity because such passive negligence as it might be guilty of in furnishing the beam without a locking device was followed by the reckless conduct of petitioner's foreman which was the predominant cause of the accident. That the foreman's conduct was predominant in causal effect and may properly be characterized as reckless and not merely negligent appears clearly from the decision, *supra*, pp. 23–27. The conditions of such liability are described as follows in the Restatement of Restitution, c. 3, Section 97:

> A person whose negligent conduct combined with the reckless or intentionally wrongful conduct of another has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tortfeasor could not have done so.

The rule thus stated is supported by various cases at law.[28] While no admiralty decision appears to have passed upon the applicability of this rule, it is believed that the cases involving the contractual situation equally support its application. Cf. *Oceanic Steam Navigation Co.* v. *Coia Transatlantic Espanola,* 134 N. Y. 461, 467. It is submitted, therefore, that even in the absence of Article 12 of the contract the United States is entitled to full indemnity at the hands of petitioner.

C. PETITIONER'S CONTENTION THAT THERE IS NO JURISDICTION TO ENFORCE ARTICLE 12 OF THE CONTRACT IN A PROCEEDING UNDER ADMIRALTY RULE 56 IS WITHOUT MERIT

The court below correctly held that jurisdiction might rest upon the fact that the United States could have sued the impleaded respondent in a civil action if not in admiralty. It has long been settled that independent admiralty jurisdiction of an ancillary claim is unnecessary to support an impleading petition under Admiralty Rule 56[29]

[28] *Nashua Iron & Steel Co.* v. *Worcester Nashua R. Co.*, 62 N. H. 159; *Colorado & Southern Ry. Co.* v. *Western Light & Power Co.*, 73 Colo. 107; *Knippinberg* v. *Lord & Taylor Co.*, 193 App. Div. 753, 184 N. Y. S. 785; *Colonial Motor Coach Corp.* v. *New York Central Ry. Co.*, 131 Misc. 891, 228 N. Y. S. 508; *Eastern Texas Elec. Co.* v. *Joiner* (Tex. Civ. App.), 27 S. W. 2d 917; cf. *Missouri, Kansas & Texas Ry. Co.* v. *Missouri Pac. Ry. Co.*, 103 Kan. 1.

[29] Rule 56 (28 U. S. C. fol. Sec. 723) provides in part: "In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. * * *"

where the whole controversy should be litigated at once. The reason for the rule was well stated long ago by Judge Hough in *Evans* v. *New York & P. S. S. Co.*, 163 Fed. 405, 407 (S. D. N. Y.), where he said:

> * * *. It seems clear that neither the libelant nor the steamship company could have maintained an original suit in admiralty against the Beards, because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and neither was the contract between shipowner and warehousemen a maritime contract. Having found, however, that the carrier is responsible to the libelant, the former clearly has his remedy over against the warehousemen, and, in order to prevent circuity of action and multiplicity of suits, it would have been, under our practice, competent for the shipowner to have petitioned the warehousemen into this proceeding, and; if this could have been done, no reason appears why the warehousemen may not be proceeded against as an original respondent.

As stated by the court below, all doubt as to jurisdiction, if any there be, is effectively removed by the existence of any independent head of federal jurisdiction.[20] *Soderberg* v. *Atlantic*

[20] Where jury trial is not demanded, no constitutional question can arise. *United States* v. *The John R. Williams*, 144 F. 2d 451, 454 (C. C. A. 2), certiorari denied, 323 U. S. 782. But even demand for a jury need present no difficulty in view of the court's powers to separate issues for trial.

Lighterage Corp., 19 F. 2d 286, 287 (C. C. A. 2), certiorari denied, 275 U. S. 542; *Admiral Oriental Line* v. *United States*, 86 F. 2d 201, 203 (C. C. A. 2), further proceedings 88 F. 2d 26; *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010, 1012 (C. C. A. 2); cf. *Tuthill* v. *United States*, 38 Fed. 538 (C. C. N. Ill.), appeal dismissed, 136 U. S. 652; *Conners Marine Co.* v. *Petterson Lighterage & Towing Corp.*, 151 F. 2d 662 (C. C. A. 2), certiorari denied April 22, 1946. So far as regards admiralty jurisdiction, this Court appears not to have passed upon the question, but at law it was well settled, even before the adoption of the Rules of Civil Procedure, that a party liable over to the defendant might be impleaded despite the absence of independent federal jurisdiction. *Phelps* v. *Oaks*, 117 U. S. 236; *Hardenbergh* v. *Ray*, 151 U. S. 112; *City of Waco* v. *U. S. F. & G. Co.*, 293 U. S. 140; *Alexander* v. *Hillman*, 296 U. S. 222; *Moore* v. *N. Y. Cotton Exchange*, 296 Fed. 61 (C. C. A. 2), affirmed, 270 U. S. 593.[21]

[21] Impleader for liability over is in effect merely a development of the practice of vouching in the party ultimately responsible, so as to bind him by the proceedings. *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 329; *Aetna Life Ins. Co.* v. *Maxwell*, 89 F. 2d 988, 991 (C. C. A. 4). The situation of merely tendering the impleaded third party to the plaintiff as one jointly liable is entirely different. There the addition of the third party is not ancillary and original jurisdiction is indispensable. Compare *Friend* v. *Middle Atlantic Transp. Co.*, 153 F. 2d 778 (C. C. A. 2), certiorari denied June 10, 1946, with *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968 (C. C. A. 2), and *Williams* v. *Keyes*, 125 F. 2d 208 (C. C. A. 5), certiorari denied, 316 U. S. 699.

In any case, there can be no doubt that admiralty had jurisdiction here. There was admiralty jurisdiction of an independent suit on Article 12 of the contract. It is elementary that both a stevedoring contract and injuries to a stevedore are maritime transactions within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59–60; *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010, 1011 (C. C. A. 2). Nor has it ever been doubted that a contract of marine protection and indemnity insurance against third-party claims is a maritime contract of independent orginal admiralty jurisdiction. A clause in any maritime contract, such as for stevedoring a vessel, which provides similar protection and indemnity in respect of third-party claims arising in the performance of the particular contract, is equally an obvious matter of original admiralty jurisdiction. *The No. 34*, 25 F. 2d 602, 607 (C. C. A. 2), certiorari denied, 278 U. S. 606 (stevedoring contract); *Moran Towing & Transp. Co.* v. *Navigazione Libera Triestina*, 92 F. 2d 37, 39 (C. C. A. 2), certiorari denied, 302 U. S. 744, *semble Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291 (towage contracts); *Davis* v. *Dittmar*, 6 F. 2d 141 (C. C. A. 2); *The Toledo*, 122 F. 2d 255 (C. C. A. 2), certiorari denied, 314 U. S. 689 (charters). And no distinction in jurisdiction has ever been drawn between cases where the respondent-impleaded was liable to indemnify by virtue of

an express provision of a contract rather than by implication of law.[32]

Petitioner's reliance upon *The Wonder*, 79 F. 2d 312, 314 (C. C. A. 2), a prior decision of the court below, to establish a lack of jurisdiction of suits on indemnity clauses, is unwarranted. That case is fully discussed in *Severn* v. *United States*, 1946 A. M. C. at 1471, where it is pointed out that the principal contract involved in *The Wonder* was to construct a drawbridge; hence, the indemnity clause was ancillary to a nonmaritime contract. As the court in the *Severn* case concluded, "It is clear that jurisdiction was declined, not because the clause called for indemnity, but because the subject matter was non-maritime." How narrow

[32] Stevedoring contracts: *Barbarino* v. *Stanhope S. S. Co.*, 151 F. 2d 553 (C. C. A. 2); *Benevento* v. *United States*, 1946 A. M. C. 858 (S. D. N. Y.); *The Thomas P. Beal*, 295 Fed. 877, 880 (W. D. Wash.), further proceedings 298 Fed. 121; *semble United States* v. *Wallace*, 18 F. 2d 20 (C. C. A. 9); *Calvino* v. *Pan-Atlantic S. S. Corp.*, 29 F. Supp. 1022 (S. D. N. Y.); repair contracts: *Severn* v. *United States*, 1946 A. M. C. 1468 (S. D. N. Y.); *Green* v. *War Shipping Adm.*, 66 F. Supp. 393 (E. D. N. Y.); *Brosnan* v. *American President Lines*, 1943 A. M. C. 526; wharfage contracts: *Eastern Mass. St. Ry. Co.* v. *Transmarine Corp.*, 42 F. 2d 58, 63 (C. C. A. 1), certiorari denied, 282 U. S. 883; *The Blue Mountain*, 20 F. Supp. 165, 167 (D. Conn.); towage contract: *Moran Towing & Transp. Co.* v. *United States*, 56 F. Supp. 104 (S. D. N. Y.); fumigating contract: *Luckenbach S. S. Co.* v. *Ruddy Fumigant Co.*, 11 F. Supp. 390 (W. D. Wash.); construction contracts: *Berwind-White Coal Mining Co.* v. *City of New York*, 135 F. 2d 443, 446 (C. C. A. 2); *Kelley Island Lime & Transport Co.* v. *City of Cleveland*, 47 F. Supp. 533, 544 (N. D. Ohio).

was the basis of *The Wonder* appears from the later decision of the same court in *Berwind-White Coal Mining Co.* v. *City of New York,* 135 F. 2d 443, 446 (C. C. A. 2), where admiralty jurisdiction was entertained of a suit on an indemnity clause in a nonmaritime contract to construct a trestle because the construction involved a requirement to restore the river bottom to a navigable condition. Thus it is evident that where, as here, the indemnity clause is incident to a contract to perform any maritime service, or is invoked in consequence of a maritime tort, there can be no doubt of the jurisdiction of an admiralty court to enforce it.

CONCLUSION

For the reasons stated, it is respectfully submitted that, unless this Court should conclude that there is no jurisdiction under the Public Vessels Act, the decision below should be affirmed.

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DECEMBER 1946.

APPENDIX

1. The Public Vessels Act, c. 428, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the pro-

visions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

2. The Federal Tort Claims Act, Title IV, Act of August 2, 1946 (Public Law 601, 79th Cong., 2d Sess.), provides in part that:

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accord-

ance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

SEC. 421. The provisions of this title shall not apply to—

* * * * *

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741–752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781–790, inclusive), relating to claims or suits in admiralty against the United States.

3. The Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424–1446, as amended (33 U. S. C. 901–950) provides in part as follows:

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1946.

American Stevedores, Inc., Petitioner, *v.* Rosario Porello and the United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

Porello, a longshoreman, was injured in 1942 while working in the hold of the U. S. S. Thomas Stone, a public vessel of the United States. His employer, American Stevedores, Inc. (called American hereinafter), was engaged in loading the vessel under a stevedoring contract with the United States. Within two weeks of the accident which caused the injuries American's insurance carrier, in compliance with § 14 of the Longshoremen's and Harbor Workers' Compensation Act,[1] 33 U. S. C. §§ 901–950, and without the compulsion of an award of compensation by a deputy commissioner under § 19, began compensation payments to Porello, who negotiated the checks he received. In March of 1943 Porello gave notice in accordance with § 33 (a) of election to sue the United States as a third party tortfeasor rather than to receive compensation. In the same month he filed a libel, amended in November, 1943, to recover damages from the United States under the Public Vessels Act of 1925,[2] 46

* This opinion also covers No. 514, *The United States of America* v. *Maria R. Lauro, as Administratrix of the Goods, Chattels, and Credits of Peter Lauro, Deceased*, on certificate from the United States Circuit Court of Appeals for the Second Circuit.

[1] 44 Stat. 1424, as amended by 52 Stat. 1164.

[2] 43 Stat. 1112:

". . . a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for

U. S. C. § 781 *et seq.*, for the injuries to his person sustained in the accident. Exceptions to the libel being overruled, the United States answered, denying fault on its part and claiming sovereign immunity from suit. Later, by a petition charging American with fault and setting forth an indemnity provision of the stevedoring contract, the United States impleaded American.[3] American then answered the libel, denying fault and asserting as an affirmative defense that, by accepting compensation payments, Porello had lost his right to sue a third party tortfeasor.

The District Court held that Porello was not barred from maintaining the action. At trial it appeared that a beam lying athwart a hatch had fallen into the hold and struck Porello, causing the injuries complained of. The Court held that the United States was negligent in not providing a locking device on the end of the beam, and held that American was negligent through its foreman, whose orders to the operator of a cargo boom caused the beam to be dislodged. Porello was awarded damages from the United States, the United States to receive contribution from American as a joint tortfeasor to the extent of half the damages less the compensation payments received by Porello. On cross appeals by the United States and American the Circuit Court of Appeals held that American was bound by the indemnity provision of the stevedoring contract to make the United States completely whole. With that modification it affirmed the decree below. 153 F. 2d 605. The important issue in this proceeding is whether the Public Vessels Act makes the United States liable for damages on account of personal injuries.

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damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States. . . ."

[3] See Rule 56, Rules of Practice for U. S. Courts in Admiralty and Maritime Jurisdiction.

The Circuit Court of Appeals thought that this question was decided by the *Canadian Aviator* case,[4] but since the issue was not squarely posed in that case we granted certiorari in order to determine it at this time. — U. S. ——.

The Public Vessels Act provides that a "libel in personam may be brought against the United States . . . for damages caused by a public vessel of the United States. . . ."[5] Petitioner argues that the Act only provides a remedy for damage to property. "Damages," however, have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress in enacting this statute.[6] Nor is it easy to conceive any reason, absent intent to the contrary, not to have inserted the word "property" in the statute, an obvious method of imposing the limitation for which the petitioner here contends. Petitioner nonetheless argues that the legislative history of the statute conclusively shows that the congressional intent was to limit redress to property damage.

The history of the Act may be briefly detailed. Starting in 1920 various bills were introduced which provided for liability of the Government to suit for damages caused by its vessels.[7] We need only consider, however, the bills that were pending in the 68th Congress by which the present act was passed: H. R. 6989, H. R. 9075 and H. R. 9535. The first provided for suits against the United States "for

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[4] *Canadian Aviator Ltd. v. United States*, 324 U. S. 215.

[5] 43 Stat. 1112, 46 U. S. C. § 781.

[6] It might be noted here that there is a distinction between damage and damages. Black's Law Dictionary cautions that the word "damage," meaning "Loss, injury, or deterioration," is "to be distinguished from its plural,—'damages,'—which means a compensation in money for a loss or damage."

[7] H. R. 15979, 66th Cong., 3d Sess.; H. R. 6256, 67th Cong., 1st Sess.; H. R. 6989, 68th Cong., 1st Sess.; H. R. 9075, 68th Cong., 1st Sess.; H. R. 9535, 68th Cong., 1st Sess.

damages caused by collision by a public vessel." The second, designed as an amendment to the Suits in Admiralty Act, and supported by the Maritime Law Association of the United States,[8] would have amended that act so that it would not be limited to vessels operated by the Government as merchant vessels, and would thus have made the United States unquestionably liable to suit for personal injuries caused by public vessels.[9] This bill never reached the floor of Congress. The third bill, H. R. 9535, was enacted and became the present Public Vessels Act. Although "designed as a substitute for H. R. 6989,"[10] it omitted the words "by collision" which would have limited the liability of the United States to damages resulting from collisions by public vessels. The only discussion of any significance to the present inquiry related to the last of these bills. It is true, as petitioner points out, that the proponent of the bill in the House, Mr. Underhill, said, when the bill was introduced: "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

"No vessel owned by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . ."

Johnson v. *Fleet Corporation*, 280 U. S. 320; *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575.

[10] S. Rep. No. 941, 68th Cong., 2d Sess.

by owners of vessels whose property has been damaged." [11] Further, on inquiry as to whether suit could be brought only where blame was charged to the Government, he answered: "Not entirely; where a man's property is damaged he can bring a suit." [12] These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions. It is also true that the Committee report said that "the chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel." [13] However, in the same report a letter from the Attorney General was incorporated, which, while it was addressed to the predecessor bill, H. R. 6989, serves, in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the act. That letter explicitly stated that "The proposed bill intends to give the same relief against the Government for damages . . . caused by its public vessels . . . as is now given against the United States in the operation of its merchant vessels, as provided by the suits in admiralty act of March 9, 1920." As the right to sue for personal injuries under the Suits in Admiralty Act was clear, it may be inferred, at least as strongly as the opposite is implied by

[11] 66 Cong. Rec. 2087.

[12] 66 Cong. Rec. 2088.

[13] S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. Of course the chief purpose of the bill was to provide a remedy for those who chiefly urged the bill—the vessel owners. But the committee, in so stating, cannot be taken to have made that purpose the only one. By that token the purpose would be to provide a remedy only for collision damages, a limitation clearly discarded by omitting the words "by collision" from the Act. *Canadian Aviator, Ltd.* v. *United States*, *supra*, n. 4.

Mr. Underhill's remarks, that the Committee understood that the Act would provide a remedy to persons suffering personal injuries as well as property damage.[14] Moreover, when the bill reached the floor of the Senate there was not the least indication that the members of that body believed that the Act limited relief to owners of damaged property.[15]

The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act[16] attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or

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[14] See note 9, *supra*.

[15] So the only pertinent comments follow, 66 Cong. Rec. 3560:

"MR. ROBINSON. I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"MR. BAYARD. Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

". . . It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. . . .

"MR. ROBINSON. If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"MR. BAYARD. All claims of this nature."

[16] Public Law No. 601, 79th Cong., 2d Sess., §§ 401–424.

property damage. To hold now that the Public Vessels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act; for that Act excepts from its coverage "Any claim for which a remedy is provided by the Act . . . of March 3, 1925 [The Public Vessels Act] (U. S. C., title 46, secs. 781–790, inclusive). . . ." [17] We cannot believe that the Public Vessels Act, read in the light of its legislative history evinces a Congressional intent only to provide a remedy to the owners of damaged property.

This determination does not dispose of all the issues raised by the *Porello* case. When impleaded by the United States in the trial court, American, the petitioner here, pleaded as an affirmative defense that Porello, having accepted compensation payments from American, lost whatever right of action he had against the United States as a third party tortfeasor. The petitioner admits that § 33 (b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which courts had reached under the former wording of the Act.[18] But it contends that the amendment did no more, and that acceptance of compensation still operates as a conclusive election

[17] *Id.*, § 421.

[18] The statute formerly provided, 44 Stat. 1440:

"Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

Under this form of the statute courts had held that acceptance of compensation precluded the employee from suing a third party tortfeasor. *Sciortino* v. *Dimon S. S. Corp.*, 39 F. 2d 210, aff'd 44 F. 2d 1019; *Toomey* v. *Waterman S. S. Corp.*, 123 F. 2d 718; *The*

not to sue. It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by § 33 (a) of the Act, which provides for notice of intention to the deputy commissioner,[19] so the argument is technically imperfect. But in any event, election not to sue a third party and assignment of the cause of action are two sides of the same coin. Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third party tortfeasor. If so held, an employer who was not responsible over to the third party might lose his chance to recoup compensation payments from the third party, while the third party might escape all liability. American, in the unusual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation.[20] In this way it could probably have forced an award and the consequent assignment of the right of action to itself.

Congress has provided that unless an employer controverts the right of the employee to receive compensation,

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Nako Maru, 101 F. 2d 716; *Freader v. Cities Service Trans. Co.*, 14 F. Supp. 456. *Contra, Johnsen* v. *American-Hawaiian S. S. Co.*, 98 F. 2d 847.

As amended the statute provides, 52 Stat. 1168:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to the compensation to recover damages against such third person."

[19] 33 U. S. C. § 933 (a):

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

[20] See 33 U. S. C. § 914 (d) and (h).

he must begin payments within two weeks of the injury.[21] The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation.[22] The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor.

American further argues that the court below, as an admiralty court, did not have jurisdiction of the indemnity provision of the stevedoring contract, and that therefore the decree granting full indemnity to the United States from American was beyond its power. A stevedoring contract is maritime. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62; *The Muskegon*, 275 F. 348. And although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful, the cases raising such doubts are concerned only with contracts for the performance of partly non-maritime activities. See *The Richard Winslow*, 71 F. 426; *Pillsbury Flour Mills Co.* v. *Interlake S. S. Co.*, 40 F. 2d 439. To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment.

[21] 33 U. S. C. § 914 (b), (e).

[22] 33 U. S. C. § 913 (a).

Whether the indemnity provision was rightly construed by the court below is a more difficult question. It was provided that:

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees, and servants."

The Stevedore, American, contends that it is liable to indemnify the United States only if damages resulted from its negligence alone. Respondent, United States, argues and the court below held, that such an interpretation would render the provision meaningless since the United States would "be liable only if itself at fault" and that the clear meaning of the provision is that the Stevedore would be liable so long as the accident was caused in whole or in part through its negligence.

American, however, insists that the clause merely stated existing law. On this record we cannot answer the contention of either party. As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not.[23] It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that the intention was that American should fully reimburse the United States for all damages caused

[23] American moved the Circuit Court of Appeals for an order allowing the parties to take proof and to submit it to the court as to the intent of the parties respecting the indemnity clause of the contract, or in the alternative for an order remanding the proceeding to the District Court for further hearing as to the intent and meaning of the clause. The Circuit Court of Appeals denied the motion.

in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. Although the usual rule in admiralty, in the absence of contract, is for each joint tortfeasor to pay the injured party a moiety of the damages, *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *Barbarino* v. *Stanhope S. S. Co.*, 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. Comparative negligence is not unknown to our maritime law. *The Max Morris*, 137 U. S. 1; *The Henry S. Grove*, 22 F. 2d 444; see Robinson on Admiralty, p. 91. From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law.

We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract.

The case of *United States* v. *Lauro*, No. 514, is here on certificate from the Circuit Court of Appeals for the Second Circuit. The certificate is quoted in full in the note.[24]

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[24] "Statement of facts

"On May 27, 1943, Peter Lauro died as a result of injuries suffered by him on May 26, 1943, while he was employed by Marra Bros., contracting stevedores, on board respondent's vessel, designated as No. 596, which vessel was docked at Pier 4, Staten Island, New York.

The only question posed by the case is whether a suit for damages for death by wrongful act will lie under the Public Vessels Act. It is settled that where death "results from a maritime tort committed on navigable waters

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The death was caused by personal injuries suffered by Lauro when he fell from a hatch cover on the vessel's main deck into the hold. At the time of the accident, the vessel, No. 596, was owned by the United States of America, respondent, and had been allocated by the respondent to the United States Army. It was being loaded with cargo which was owned by the United States, and which consisted of Army and Navy property and Lend-Lease material which was being shipped to North Africa. Marra Bros., the employer of the deceased, was hired by the United States Army to load the vessel.

"Thereafter, Lauro's widow filed a libel in the United States District Court for the Eastern District of New York against United States of America to recover damages under the Public Vessels Act of 1925; 46 U. S. C. Section 781, for wrongfully causing Lauro's death. In this proceeding the District Court rendered a decree awarding damages to the libelant in the sum of $25,000. From this decree an appeal was taken to this court, and the cause came on for argument on March 12, 1946. On this appeal, the respondent-appellant contended that the said Public Vessels Act of 1925 provided a remedy against the United States for damage to property only, but not for damage to a person of damage arising by reason of the death of a human being. The question thus arising is as follows:

"Question certified

"Does the word 'damages,' as it appears in the following sentence of the Public Vessels Act of 1925; 46 U. S. C. § 781:

'A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920'

mean damages to property only, or does it mean, as well, damages under Sections 130 to 134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being? Which question, arising from the facts aforesaid, is hereby submitted to the Supreme Court."

within a State whose statutes give a right of action on account of death" the admiralty will entertain a libel for damages sustained by those to whom the right is given. *Western Fuel Company* v. *Garcia*, 257 U. S. 233. See discussion in *Just* v. *Chambers*, 312 U. S. 383, 388–391. Here the death occurred on navigable waters of New York, which has a statute granting a right of action for damages on account of wrongful death. Nor can damages suffered on account of death be distinguished from damages on account of personal injuries. Death is the supreme personal injury. For the reasons stated in the *Porello* case we conclude that the word "damages" in the Public Vessels Act, § 1, 46 U. S. C. § 781, means damages under §§ 130–134 of the New York Decedent Estate Law. Accordingly we answer the certificate as follows: The word "damages" as used in 46 U. S. C. § 781 includes damages under §§ 130–134 of the Decedent Estate Law of the State of New York recoverable by a personal representative because of the death of a human being.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1946.

American Stevedores, Inc., Petitioner, *v.* Rosario Porello and the United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Frankfurter, with whom The Chief Justice concurs, dissenting.

Without disregarding the significance which we have heretofore attached to legislative history, I cannot give the Public Vessels Act [1] the scope given it by the Court.

It can hardly be maintained that, in the setting of legal history, the phrase "damages caused by a public vessel" must cover personal injuries due to failure to provide proper working conditions for a longshoreman. The problem for construction is not whether the term "damages" may be applied to money compensation for hurt to person or property. What is to be construed is "damages caused by a public vessel". Standing by itself, that phrase, spontaneously read, may well mean damage inflicted by a public vessel rather than "damages" incurred in connection with its operation. All we held in *Canadian*

[1] 43 Stat. 1112, 46 U. S. C. § 781: "That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

Aviator, Ltd. v. United States, 324 U. S. 215, was that its personnel was part of the public vessel for purposes of "causing" damage to another vessel.

The words do not stand alone. They are illumined by the legislative history of the Public Vessels Act. This history has been so accurately summarized in the Government's brief that we shall avail ourselves of it:

"On May 29, 1924, Mr. Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit 'for damages caused by collision by a public vessel,' and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge. It did not have the unqualified approval of the interested departments, which were insisting on important changes.

"The omission of H. R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello.

But protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Committee, introduced H. R. 9535, which, in place of limiting its grant of jurisdiction to suits 'for damages caused by collision by a public vessel,' covered all suits 'for damages caused by a public vessel.' The purpose of this change is nowhere discussed. Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong. Rec. 2087): 'The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents.' Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury."

In scores of cases in recent years this Court has given "decisive weight" to legislative history. It has done so even when the mere words of an enactment carried a clear meaning. An impressive course of decisions enjoins upon us not to disregard the legislative history of the Public Vessels Act unless it is so completely at war with the terms of the statute itself that we must deny one or the other. We can find such a conflict only by reading the Act itself with dogmatic inhospitality to the usual illuminations from without.

We cannot escape the conclusion that there was no jurisdiction for this libel in the District Court.[2]



[2] This conclusion is reinforced by the Report of the Senate Committee that "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel" S. Rep. No. 941, 68th Cong., 2d Sess., p. 1. The Court's opinion finds overriding significance in a letter by the Attorney General commenting on the Bill, in which he stated that it "intends to give the same relief against the Government for damages caused . . . by its public vessels" as was given by the Suits in Admiralty Act. That Act did afford the right to sue for personal injuries. To prefer the Attorney General's view to that expressed by those in charge of a measure would in itself be not the normal choice. And this letter of the Attorney General antedated the Report of the Committee and the statement of Representative Underhill. Compare *United States* v. *Durkee Famous Foods*, 306 U. S. 68, 71, where the Committee Report "stated that the purpose of the bill was set out in a letter from the Attorney General which it quoted." To reject the subsequent authoritative statements of the Congressional proponents of the legislation and to accept the view of the Attorney General to which the Government now does not even refer, is to discard in favor of dim remote light what heretofore has been deemed controlling illumination.